

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
The Detroit Edison Company seeking
approval and authority to implement
its proposed Advanced Metering
Infrastructure Opt Out Program.

Case No. U-17053

Volume No. 2

_____ /

MOTION HEARINGS

Proceedings held in the above-entitled
matter before Dennis W. Mack, Administrative Law Judge
with MAHS, at the Michigan Public Service Commission,
4300 Saginaw Street, Hearing Room 1, Lansing, Michigan,
on Tuesday, January 8, 2013, at 9:00 a.m.

APPEARANCES:

MICHAEL J. SOLO, ESQ.
DTE ENERGY
One Energy Plaza, 688 WCB
Detroit, Michigan 48226

On behalf of The Detroit Edison Company

JOHN A. JANISZEWSKI, Asst. Attorney General
525 W. Ottawa Street, 7th floor
P.O. Box 30755
Lansing, Michigan 48909

On behalf of Attorney General Bill Schuette

PATRICIA S. BARONE,
Assistant Attorney General
6545 Mercantile Way, Suite 15
Lansing, Michigan 48911

On behalf of Michigan Public Service
Commission Staff

(Continued)

1 PRESENT In Pro Per:

2 JOHN A. HOLETON
2392 Barclay Avenue
3 Shelby Township, Michigan 48317

4 DOMINIC CUSUMANO
LILLIAN CUSUMANO
5 25801 Harper, #4
St. Clair Shores, Michigan 48081

6
7 CYNTHIA EDWARDS
1985 Upland Drive
Ann Arbor, Michigan 48103

8
9 LINDA KURTZ
2150 Foss Street
Ann Arbor, Michigan 48103

10
11 RICHARD MELTZER
20850 Wink Street
Southfield, Michigan 48076

12
13 SHARON SCHMIDT
20238 Catalano
Clinton Township, Michigan 48035

14
15
16
17
18
19
20
21
22
23
24 REPORTED BY: Marie T. Schroeder, CSR-2183
25

1 JUDGE MACK: Thank you.

2 MS. CUSUMANO: Lillian Cusumano on behalf
3 of myself.

4 JUDGE MACK: Thank you.

5 MS. EDWARDS: Cynthia Edwards on behalf
6 of myself.

7 JUDGE MACK: Thank you.

8 MS. KURTZ: Linda Kurtz on behalf of
9 myself.

10 JUDGE MACK: Thank you.

11 MR. MELTZER: Richard Meltzer on behalf
12 of myself.

13 JUDGE MACK: Thank you.

14 MS. BARONE: Patricia S. Barone,
15 Assistant Attorney General, appearing of behalf of the
16 Michigan Public Service Commission Staff.

17 JUDGE MACK: Thank you, Ms. Barone. Any
18 other appearances? Hearing none, we will now take up the
19 pending motions to strike. The first one we'll take
20 argument on is what Robert Holeton filed.

21 So Mr. Holeton, with that you may begin
22 your argument.

23 MR. HOLETON: Yes, your Honor. There is
24 two motions that I put out, one motion was to strike Mr.
25 Sitkauskas's testimony, his direct testimony. And I'd

1 like to go ahead and I'll withdraw my motion to strike
2 his original direct testimony. But I'd like to go ahead
3 and continue on the motion to strike Mr. Solo's testimony
4 to deny, to strike my testimony as he is in violation of
5 the --

6 JUDGE MACK: Hold on, Mr. HOLETON.

7 MR. HOLETON: Yeah. I put forth two
8 motions. One motion was to strike Robert Sitkauskas's
9 testimony.

10 JUDGE MACK: O.K. Let's deal with that.
11 So you are withdrawing that motion.

12 MR. HOLETON: I am withdrawing that
13 motion, your Honor.

14 JUDGE MACK: O.K. That is noted on the
15 record. Now your second motion, which I believe you're
16 contending was a component of your first motion?

17 MR. HOLETON: No, your Honor. Well, they
18 are related. Mr. Solo, O.K., tends to go ahead and try
19 to, well, basically he lied to the Court, your Honor. He
20 says that my testimony, my direct testimony to the Court
21 was full of health effects and technical data related to
22 smart meters. And if you look at my --

23 JUDGE MACK: I understand. I'm just
24 trying to get the setup right. Mr. Solo doesn't testify.

25 MR. HOLETON: No. He made --

1 JUDGE MACK: So it's not testimony. Mr.
2 Solo filed a response to your motion. And what I am
3 hearing is, you are taking issue with certain
4 characterizations in that response.

5 MR. HOLETON: Yes. He filed a motion to
6 strike my direct testimony.

7 JUDGE MACK: O.K. And we will get to
8 that. That's one of the motions that we will get to when
9 we deal with Edison's and Staff's motion. So at this
10 point I just wanted to deal with your motion to strike
11 Mr. Sitkauskas's testimony. And you have withdrawn that.
12 You will get the opportunity to argue against his motion.
13 Does that make sense?

14 MR. HOLETON: Yes, your Honor.

15 JUDGE MACK: O.K. So that's all I wanted
16 to do, was deal with your motion.

17 MR. HOLETON: With Mr. Sitkauskas.

18 JUDGE MACK: Mr. Sitkauskas. That motion
19 is withdrawn and I will not have to address it.

20 MR. HOLETON: Yes, your Honor.

21 JUDGE MACK: And then you will get the
22 opportunity to respond to Edison's motion.

23 MR. HOLETON: O.K. Because I put another
24 motion in my reply. I also put in a motion to deny his
25 motion to strike my evidence.

1 JUDGE MACK: Right. And that would be
2 what you would argue on your response.

3 MR. HOLETON: That's what I would argue
4 when he presents his case.

5 JUDGE MACK: Right. Well, not his case
6 today. I don't want to get too technical, but Mr. Solo
7 is going to argue that motion and then you are going to
8 get a chance to respond to that. O.K.

9 MR. HOLETON: Sounds good, your Honor.

10 JUDGE MACK: O.K. So we have taken care
11 of Mr. Holeton's motion. And with that, then we will
12 turn to the Company's motions and Mr. Solo.

13 MR. SOLO: Thank you, your Honor. I
14 filed a total of 12 motions to strike in this case, and
15 in large part I'll rely on my written responses, which I
16 trust you had to time to read, your Honor.

17 I'd like to attempt to try and explain my
18 position with some attempt at simplifying or organizing
19 the nature of the testimony for the convenience of this
20 Court.

21 There are seven separate pieces of
22 testimony from individual customers who describe in
23 various ways their concerns about AMI meters. They
24 describe health concerns that they have and other what
25 I'll call general objections to AMI being utilized at

1 their home. The primary argument I have against
2 admitting that evidence is relevancy, your Honor. Under
3 the Michigan Rules of Evidence, relevant evidence means
4 evidence having any tendency to make the existence of any
5 fact that is of consequence to the determination of an
6 action more probable or less probable than it would
7 without the evidence.

8 Back in the summer, your Honor, the
9 Commission initiated a proceeding in Docket U-17000 where
10 they investigated a number of customer concerns with
11 regard to AMI meters. In that docket, dozens of
12 customers voiced concerns about AMI on a number of
13 different matters, including health and safety, privacy,
14 data security, et cetera. After those comments were
15 filed, prior to the Commission issuing its order in that
16 case, the Company elected to offer an Opt Out Program to
17 its customer with regard -- regardless of what reason
18 that they chose. We understood that these customers had
19 concerns, we didn't agree with those concerns, we didn't
20 necessarily agree that health concerns were related in
21 any respect to AMI meters, but nonetheless we decided to
22 offer a program to allow people to opt out no matter what
23 their reason was, your Honor.

24 The Commission thereafter, on
25 September 11th of last year, issued an order recognizing

1 those same concerns, finding that they didn't believe
2 that there was any significant health effects
3 attributable to AMI, but nonetheless required utilities
4 to file opt out programs.

5 The scope of this proceeding, your Honor,
6 is directly related to the application that was filed by
7 the Company that set the boundaries for this case, and
8 those boundaries limit the subject matter of this case.
9 They're limited to the specific details of our proposal,
10 along with the conditions established by the Commission
11 that such proposals should be designed utilizing cost of
12 service principles. That's the primary argument.

13 I note, your Honor, that the intervenors
14 filed, in response to my motion, they suggested that this
15 material was relevant, but also noted that it was
16 important that the Commission get to hear these words and
17 understand these concerns expressed by these customers.
18 And I appreciate that, your Honor. When I reviewed this
19 docket in U-17000, part of hearing those comments was the
20 reason that we decided to have an Opt Out Program in the
21 first place. But I'd like to point out that if the
22 concern is with the Commission having the information,
23 that concern has been resolved. It's been resolved in
24 Docket U-17000. But it's also been resolved by having
25 public comments provided in this specific docket, your

1 Honor, where a number of people made similar statements
2 with regard to their concerns with AMI and their
3 allegations regarding health effects that they have and
4 those health effects being either caused or exacerbated
5 by AMI. Those statements have already been made and
6 they're very similar to the words that are given and
7 being proposed as testimony in this matter. So your
8 Honor, for those reasons, this testimony is irrelevant,
9 it shouldn't be admissible.

10 I also note that in the intervenors
11 response to my motion, they also took exception to my
12 alternative argument with regard to Rule 403 that would
13 allow relevant evidence to also be determined
14 inadmissible because of the fact that it could cause
15 prejudice or repetition. I would note that the
16 Administrative Procedures Act, specifically MCL 24.275,
17 does provide that this type of basis for objection does
18 operate in these administrative proceedings. I believe
19 that the intervenors' response used a 4th circuit case
20 talking about how there is a difference between jury
21 trials and bench trials and that the bench should have
22 the ability to exercise its judgment in these cases
23 without the concern of prejudice.

24 That issue is moot for two reasons: One,
25 because this is in fact not relevant evidence and that's

1 to the extent, in reply, to the extent that it was
2 determined that this evidence was relevant. And then
3 two, because the Administrative Procedures Act resolved
4 that concern.

5 The other argument that I have, and I'll
6 speak generally, we can get into more specific detail if
7 you require, your Honor, although I did provide that
8 detail in my written responses, is with regard to
9 hearsay. And there are a number of places in the
10 testimony and also with regard to the exhibits that were
11 provided for those witnesses that constitute inadmissible
12 hearsay. There are statements made by someone other than
13 the declarant for the truth of the matter asserted. I
14 note that intervenors in their response put forth an
15 argument saying that they were not offered for that
16 purpose. I tend to agree. In fact, there is no other
17 basis for providing testimony in this case if it's not
18 related to the truth of the matter asserted.

19 They also make a note of the discussion
20 of preliminary questions under Rule 104, and argument
21 that that was the reason it would not be hearsay and it
22 was permissible. But this content is not preliminary
23 questions in any respect. If you take a look through
24 each of those seven forms of testimony, there is a number
25 of allegations that are made, statements made by doctors,

1 discussions of e-mails and other documents, that are not
2 the words of the witness in this case.

3 I also note that they had submitted a
4 handful of exhibits without any foundation whatsoever.
5 And these exhibits were not authored by the witness, they
6 haven't been authenticated. They are ranging from
7 Prevention magazine articles to medical records to other
8 statements or e-mails or documents from doctors and other
9 people who are not witnesses in the case. So for those
10 particular seven, my primary argument of course is
11 relevance, and also that the hearsay content should be
12 stricken from the record.

13 Your Honor, I'll be happy to continue and
14 go through the other witnesses at some level of detail.
15 Or would you prefer me to stop at this juncture or
16 continue on?

17 JUDGE MACK: I guess I'd have a question,
18 Mr. Solo. You would agree the Administrative Procedures
19 Act has a relatively relaxed evidentiary standard?

20 MR. SOLO: I would, your Honor.

21 JUDGE MACK: Would some of the challenged
22 exhibits perhaps fall under that, say the technical --
23 not assuming relevancy, just taking that up.

24 MR. SOLO: Perhaps, your Honor. It's
25 common that expert witnesses will rely on a host of

1 documentation and, your Honor, you're comfortable with
2 the history of our regulatory proceedings, and I would
3 agree with you and acknowledge that in that respect it's
4 relaxed. But ultimately it would first have to survive
5 the relevancy requirement.

6 I also understand that, to some extent,
7 that the formal process with regard to authenticating
8 documents is also lax in some respects at the Commission.
9 But with regard to the exhibits that I refer to, the
10 primary issue is that they're not relevant because of my
11 prior discussion that I provided your Honor.

12 JUDGE MACK: O.K. Thank you, Mr. Solo.
13 That's everything I needed to know. Anything else?

14 MR. SOLO: Well, I can proceed. There's
15 additional nuances with the remaining witnesses that I
16 could speak of now, if that's efficient for you. Or I
17 can separate it and address the first seven separately.

18 JUDGE MACK: However you're comfortable
19 doing. When it ultimately comes time to make a ruling,
20 I'm going to deal with each individually.

21 MR. SOLO: O.K., your Honor. I'll
22 proceed and, as I indicated initially, I'm relying in my
23 written responses primarily, so I'll try to keep it as
24 efficient as possible.

25 JUDGE MACK: Sure.

1 MR. SOLO: The next one I'd like to
2 mention, because it's a bit different, is Mr. Holeton's
3 testimony. I heard his words this morning, your Honor,
4 and I agree that Mr. Holeton has a point in that I used a
5 generic term with regard to health effects and technology
6 concerns in my motion. I do agree with him that his
7 testimony is largely about things other than the health
8 effects that were predominant in the previous seven
9 witnesses. So to that extent, I apologize. Frankly I
10 withdraw my objection for the reason that he is focussing
11 on health issues. If that offended him, I apologize for
12 that.

13 My concern with his testimony, however,
14 is that it's predominately legal argument that is not
15 relevant and not admissible. He cites a number of laws
16 and his interpretation of those laws and how they should
17 have effect in this case. Those type of arguments would
18 be appropriate in briefs but not in the form of direct
19 testimony, particularly not in the form of direct
20 testimony by a non-lawyer non-expert on that subject. So
21 for that reason, I believe that Mr. Holeton's testimony
22 should be stricken.

23 I also note that the Staff has a similar
24 motion, and I agree with the conclusion reached by the
25 Staff in their motion and would support their motion.

1 JUDGE MACK: Well, I guess, Mr. Solo, Mr.
2 HOLETON'S testimony, particularly a few of his exhibits,
3 have technical data. And as far as hearsay, for example
4 Exhibit A-6, would you agree that that may be able to
5 come in under the APA evidentiary standard?

6 MR. SOLO: No, your Honor.

7 JUDGE MACK: O.K.

8 MR. SOLO: Mr. HOLETON is not an expert
9 in those technical categories, nor does he purport to be
10 in his testimony in any respects. I would agree that if
11 he was an expert testifying on a technical subject
12 matter, it would be appropriate for him to rely on a host
13 of materials. And with regard to the application of the
14 Administrative Procedures Act, the media lacks processes
15 associated with authenticating the foundation for those
16 documents, compared to what you might expect in the
17 circuit courts. But in this case Mr. HOLETON is not an
18 expert in that subject matter with regard to those
19 technical declarations.

20 JUDGE MACK: O.K. And I don't believe
21 your motion went to all of the exhibits. I think Ms.
22 Barone's motion went to all of those exhibits. But you
23 have joined in, and I'll ask you and I'll probably ask
24 Ms. Barone at some point: There is a letter from
25 Commission Staff to Mr. HOLETON. Is it your contention

1 that is also hearsay?

2 MR. SOLO: I believe it is, your Honor.
3 It's possible, I apologize for not being that precise.
4 As you know, there's 12 motions I'm trying to juggle
5 right now. I did review that letter. I would agree that
6 it is not a letter written by Mr. Holeton, it wasn't
7 offered by him, and for those reasons it is hearsay.
8 There is no appropriate exception to hearsay that would
9 apply, for my opinion. I believe what's the contention
10 that the Staff drew regarding that document.

11 JUDGE MACK: Just so the record is clear,
12 that's proposed Exhibit A-7 attached to Mr. Holeton's
13 direct. I'll take it then that the Company is seeking to
14 strike all of those exhibits?

15 MR. SOLO: Yes, your Honor.

16 JUDGE MACK: O.K. Thank you. Anybody
17 else you want to go into detail on?

18 MR. SOLO: Yes, some. Witness Schmidt
19 filed testimony that was essentially a response to our
20 discovery. I filed my written response indicating that
21 that's not appropriate rebuttal testimony. I have
22 nothing further to add with regard that argument, your
23 Honor, unless you have questions.

24 With regard to Mr. Curtis Bennett, I have
25 the relevancy argument that's consistent with my concerns

1 that I described in the health context. This relevancy
2 argument is the exact same argument, but the distinction
3 here is he's discussing technical issues with regard to
4 AMI and his analysis and his view regarding RF
5 frequencies and EMF and other issues that are also not
6 relevant because this case is about the Opt Out. It's
7 not about whether the AMI technology is warranted or
8 sound or should have been approved in the first place.
9 This is about an opt out proposal and nothing more.
10 Therefore, that particular comment is not relevant.

11 In addition, I note that a number of
12 these exhibits that are sponsored by Mr. Bennett, and I
13 guess for the sake of clarification of the record,
14 Mr. Bennett's testimony was sponsored by Intervenors
15 Dominic and Lillian Cusumano, just to make that clear.

16 JUDGE MACK: Thank you.

17 MR. SOLO: Those exhibits do not have any
18 foundation and they're hearsay. They are a handful of
19 e-mails and other documents and some excerpts from a
20 website, a document from American Academy of
21 Environmental Medicine and some pages that are titled the
22 Thermal Guide. There has been no proper foundation laid
23 for those exhibits. They are not authored by the witness
24 and they're inadmissible hearsay.

25 The final -- I also understand, your

1 Honor, that the testimony of Mr. Wilson was withdrawn, so
2 I have no response with regard to that motion.

3 JUDGE MACK: Yes.

4 MR. SOLO: Then the last one, your Honor,
5 is regarding Witness Meltzer. And I have a primary
6 concern regarding hearsay in his testimony. He provided
7 statements of a number of people, including an attorney
8 who is a practitioner here in regulatory proceedings, Mr.
9 Strong, and so I would reiterate that those are
10 statements made by someone other than the witness, it's
11 impermissible hearsay, there's no appropriate hearsay
12 exception that would apply to that, and therefore those
13 exhibits should be stricken.

14 With that, your Honor, I will rely on my
15 written responses. I have tried to efficiently focus
16 this, but I'll be happy to answer any questions that you
17 have throughout the proceedings today.

18 JUDGE MACK: Thank you, Mr. Solo. And
19 when it comes to Mr. Meltzer, I am going to ask him some
20 questions about the rebuttal, the surrebuttal, and you'll
21 obviously then have a chance to respond to that. I think
22 there is some clarification that is necessary.

23 MR. SOLO: Thank you, your Honor. I
24 understand that, that he had filed a motion getting
25 permission, so I would assume I would make that argument

1 at that juncture.

2 JUDGE MACK: I don't know if there was a
3 motion. We'll address that.

4 MR. SOLO: Fair enough, your Honor.

5 JUDGE MACK: Thank you, Mr. Solo. Ms.
6 Barone, your Staff's motion.

7 MS. BARONE: Yes, your Honor. As Mr.
8 Solo indicated and Staff is concerned, the testimony
9 being offered by various witnesses in this case regarding
10 health/safety concerns is beyond the scope of the case.
11 Those concerns were addressed in Case U-17000. And this
12 particular docket we would argue is a very narrow
13 discreet topic which is the subject of whether a tariff
14 should be approved as applied for by Edison and if the
15 rates contained in the tariff would be just and
16 reasonable. We would submit that this is a very narrow
17 issue.

18 As I indicated in my motion, the
19 Commission decided in U-17000 that an on-going assessment
20 of whether the meters provide benefits and to assess
21 costs should be done on a case by case basis in the
22 context of general rate cases. This is a single issue
23 tariff case, and the tariff can be and will be
24 re-examined in the Company's next general rate case, in
25 all its respects. So there is no need to re-litigate

1 U-17000. I think the Commission was clear about that.

2 Now, with respect to the question of the
3 various opinions that are contained in the testimony that
4 we have moved to strike. In order to give expert
5 opinion, a person must be qualified as an expert. There
6 is no question that a number of the witnesses who discuss
7 their own health problems and the problems of others,
8 that they sincerely believe and they even have been
9 informed by medical professionals that there is an
10 association with the meters. However, the problem with
11 this testimony is, it's hearsay, it's what others have
12 told them, and it lacks a proper expertise to support it.
13 The purpose of excluding hearsay is because we don't have
14 those people in the room to cross-examine. We don't have
15 the medical experts to cross-examine regarding the
16 assertions. And so it's inherently unreliable because of
17 that inability to cross-examine.

18 And your Honor, this issue with regard to
19 the APA's more or less standards on evidence, I think
20 it's extremely important that the record in each of these
21 administrative cases be a record that contains only
22 evidence that the Rules of Evidence, which were developed
23 to make sure that the evidence is reliable, only contain
24 that sort of evidence. While there may be a rare case in
25 which it's appropriate to relax the standard of evidence,

1 I think that the Court of Appeals can always review these
2 cases on appeal and that the records need to contain
3 reliable, admissible evidence.

4 In Commission cases there is an enormous
5 amount of money involved. I think for that reason
6 historically -- I have done this for 28 years now -- the
7 Rules of Evidence have been applied pretty strictly
8 because you are, you know, litigating issues that are of
9 significant importance to the public. So these
10 proceedings, even though the APA recognizes a more
11 relaxed standard and our Commission rules permit a more
12 relaxed standard, when circumstances warrant it, I think
13 in a tariff case, which is a type of rate being approved
14 in a general rate case, that the standard has been
15 applied strictly because there is a lot at stake.

16 I will rely on my motion for the
17 specifics with regard to each party.

18 With respect to A-7, I believe you
19 mentioned, of Mr. Holeton's exhibits. First of all, of
20 course we don't agree that the subject matter in that
21 exhibit is relevant, but if it were to be considered,
22 even though it's not relevant, then I would say that it
23 does constitute hearsay to the extent that it's trying to
24 prove any of the various things that the author says
25 Mr. Holeton asserted in his communications to the

1 Commission. To the extent it were offered just to prove
2 that the Commission received it, then it would not be
3 admissible hearsay. But to the extent it's trying to
4 prove what he said before, what the responses were, et
5 cetera, then I would submit it's still hearsay. And more
6 importantly, I think it's beyond the scope of the case.

7 That would conclude my remarks at this
8 time, your Honor, and I rely on my motion. And if there
9 are more specific assertions from other parties, I could
10 respond to those after they speak.

11 JUDGE MACK: Thank you, Ms. Barone.
12 Let's go off the record.

13 (Brief discussion held off the record at 9:25 a.m.)

14 JUDGE MACK: Let's go back on the record.
15 We have an Assistant Attorney General who has joined us.
16 Would you like to make your appearance, Mr. Janiszewski?

17 MR. JANISZEWSKI: Thank you, your Honor.
18 John Janiszewski appearing on behalf of Attorney General
19 Bill Schuette.

20 JUDGE MACK: Thank you. Mr. Janiszewski,
21 any response to the pending motions to strike?

22 MR. JANISZEWSKI: At this time the
23 Attorney General is not taking any position on any of the
24 motions today.

25 JUDGE MACK: Thank you. Let's now turn

1 to the intervenors. I am going just going to go through
2 them alphabetically. So that means, Mr. Cusumano, you
3 may reply to the motions.

4 MR. CUSUMANO: Your Honor, I would like
5 to reply to the motions first and then have Lillian
6 follow up behind me with some comments also.

7 I'd like to take the motion to strike the
8 testimony. Edison would like to believe that the health
9 and safety does not cover this issue and it doesn't come
10 into play. But in essence what's happening here is,
11 we're putting the horse behind the cart because what ends
12 up happening in the end is, by putting an Opt Out Program
13 out there for the public, it diminishes the amount of
14 people that will be able to opt out, which also in turn
15 creates a larger liability for the utility companies in
16 the end. By doing that, the ratepayers are the ones that
17 are going to end up paying for those liabilities.

18 The health and safety issues they say do
19 not come into play here, that they were all taken care of
20 in U-17000. U-17000 was not an evidentiary hearing.
21 There was no testimony. There were 400 comments
22 submitted, and the comments basically were almost
23 ignored. We had -- This proceeding actually is in a way
24 premature and should not even be up for an opt out.
25 Relevancy to liability, who will pay for the

1 repercussions and the health and safety lawsuits that
2 will proceed once this deployment is totally out there?

3 Curtis Bennett's testimony is very
4 important and should not be stricken because Curtis
5 Bennett is an expert. Curtis Bennett has testified
6 before the Texas Senate and the Oregon Senate in their
7 proceedings. He's also testified in the British Columbia
8 Parliament, ending with the Canadian Health Standard
9 under Safety Six standards. And as far as his testimony,
10 it's very important that you understand exactly what this
11 whole situation is and the liability factors that come
12 into play. The model that is used for the tests is an
13 antiquated situation, and because of that the liability
14 factors are going to be sky high. They'll be off the
15 charts. The amount of money, like I said, for the opt
16 out is a deterrent to opt out where the amount of people
17 that will opt out will diminish and cause a larger
18 liability by the utility.

19 We thought that these standards would be
20 very important, and they should not be ignored. And I
21 would like to state on the record that I am not -- you
22 know, it seems to me on a personal level that it's like
23 Detroit Edison is the enemy and we are trying to fight
24 the enemy. We are actually here to help Detroit Edison,
25 because in the end the problems that are going to occur

1 and the lawsuits that are going to come into play are
2 going to be tremendous, and the ratepayers will end up
3 paying for all of these lawsuits.

4 JUDGE MACK: Is that it, Mr. Cusumano?

5 MR. CUSUMANO: Yes.

6 JUDGE MACK: O.K.

7 MR. CUSUMANO: I would like Lillian to
8 speak, if possible, on our behalf also.

9 JUDGE MACK: Well, Lillian comes after
10 Dominic, so Lillian is going to be next. So thank you,
11 Mr. Cusumano.

12 And with that, Mrs. Cusumano, do you have
13 any reply to the pending motions?

14 MS. CUSUMANO: Yes, I do, your Honor.
15 Thank you. Your Honor, we want to address the objection
16 as to scope and relevancy first. Our position is that
17 the proposed opt out fees submitted by DTE should be
18 rejected and that the proposed decision coming out of
19 this case should instead be a finding that because of
20 illegality of smart meters that have nowhere been
21 previously established by any lawful evidentiary
22 proceeding, that no customer is at the present time under
23 an obligation to accept a smart meter and that no fee may
24 be charged a customer for refusing a smart meter until
25 such time as the health, safety, and privacy rights of

1 smart meters have been resolved by an evidentiary
2 hearing.

3 We argue, your Honor, that such a
4 proposed decision would be within the scope of this case,
5 and that to support such a conclusion it is appropriate
6 for at least preliminary evidence to be offered to show
7 that there are substantial health and safety concerns
8 that would warrant further evidentiary proceedings before
9 any opt out fee requirement can be enacted.

10 Further, your Honor, Mr. Bennett's
11 testimony can provide such preliminary evidence and would
12 therefore be probative. The objections to Mr. Bennett's
13 testimony -- and I believe there are three kinds of
14 objections that have been raised by motions to strike of
15 Detroit Edison and the Commission Staff -- and they are
16 firstly that his testimony is beyond the scope of this
17 proceeding or that it is irrelevant to this case because
18 it does not bear on the question of whether the opt out
19 plan should be accepted, modified, or rejected.

20 Our response to that is that that is not
21 true. And Mr. Bennett's testimony bears greatly to this
22 hearing. Mr. Bennett's testimony is so compelling and
23 tantamount to the issue at hand that Mr. Bennett's
24 national credentials as a journeyman electrician, a Red
25 Seal, and apprenticeship training includes designing

1 magnetic fields to produce electromagnetic fields,
2 frequencies, and includes extensive mathematical theory,
3 in a substantial practical laboratory environment. He
4 has also earned a construction engineering technologist
5 diploma which consists of every aspect of construction,
6 from contracts to completion. His testimony will show
7 and reveal that he has completed an education in
8 engineering, magnetic fields, heat transfer and electron
9 flow specifically to complement technology that allows
10 one to see temperatures beyond the visual spectrum. This
11 specialized trait qualifies him to present testimony on
12 behalf of all the intervenors and the general public
13 interests, the need to reject the AMI Opt Out proposal
14 until further lawful evidentiary proceedings are
15 conducted and until such time as health, safety, and
16 privacy risks of smart meters have been resolved by an
17 evidentiary hearing.

18 So through Mr. Bennett's testimony, the
19 mere inference of overwhelming evidence and peer review
20 studies will and can show and reveal that the wireless
21 smart meter is illegal as applied and that critical
22 information is missing. The specific absorption rate
23 study, which is called SARS, used by the FCC and Health
24 Canada and all international organizations, only
25 considered the wireless smart meter as an end use device

1 along with the cell phones and the wireless computer.
2 They left out the routers, relays, tower antennas,
3 collectors, and other wireless infrastructure radiating
4 large geographical areas to communicate with the end use
5 device. As soon as you incorporate the routers,
6 collectors, antennas, relays and wireless infrastructure
7 radiating large areas to speak with meters, you have
8 causation for stimulation of tissue, which is to be
9 avoided.

10 JUDGE MACK: Mrs. Cusumano, you're
11 getting into facts here, so if we could just stick with
12 argument. I got Mr. Mr. Bennett's testimony, it's been
13 prepared. You're arguing that he is qualified, that it's
14 a subject area of which he has expertise.

15 MS. CUSUMANO: May I address that
16 statement, your Honor?

17 JUDGE MACK: Sure.

18 MS. CUSUMANO: My position would be that
19 it is very important to make this notation on the record
20 in that the fact he is attempting to strike information
21 that is being subjected to the Court, for information to
22 make this Court aware of the horrific situations that
23 they are proposing to the general public. All of this
24 information is very critical. It may be a statement that
25 you can determine you wish to accept, or it can be a

1 statement that I can just make for the record.

2 JUDGE MACK: Well, no. See, that's where
3 we're kind of miscommunicating. We're not making
4 statements for the record, we're making argument. And
5 before anybody --

6 MS. CUSUMANO: O.K.

7 JUDGE MACK: -- can consider this
8 testimony, it has to be admitted.

9 MS. CUSUMANO: O.K.

10 JUDGE MACK: We have a challenge to the
11 admissibility. And you began with your contention that
12 it's relevant.

13 MS. CUSUMANO: O.K.

14 JUDGE MACK: That he is qualified to
15 opine. Let me ask you this question: Is it your
16 intention to have Mr. Bennett here next week to be
17 subject to cross-examination?

18 MS. CUSUMANO: Yes. With the Court's
19 permission, I would like to know what date you would like
20 to have him here, but I would have him here for
21 testimony.

22 JUDGE MACK: Well, he's here when you
23 bring him in. Your case -- we go Tuesday, Wednesday, and
24 Thursday. So you can always talk -- if the testimony or
25 if the motion is denied -- but at this point I'd like you

1 to get away from the facts and just stick to the
2 argument. I understand you feel this is important. But
3 this is not the time to deal with the importance of the
4 issue, just the admissibility.

5 MS. CUSUMANO: O.K. But for the reasons
6 that I have already stated then, Mr. Bennett is highly
7 qualified to make an opinion and be qualified as an
8 expert and to testify in this hearing and to further
9 substantiate a need to protect the general public's
10 interests, the utility company's liabilities, and the
11 basis for which this matter should be heard.

12 In relation to an objection that was
13 stated that he is offering it to put testimony in the
14 medical area where his qualifications have not been
15 established, our response is that that is not true. As a
16 master electrician, your Honor, they are required by law
17 to take electrical capacity and watts into consideration
18 when applying their skill, training, and fiduciary duty
19 to the general public against loss, safety or harm caused
20 by electricity. They must understand the load capacity
21 of the human body and human tissue, including all living
22 organisms.

23 Mr. Bennett's extensive background, as
24 I've just alluded to, demonstrates the fact that he is
25 highly qualified to render a decision. And if Mr. Solo

1 or the Detroit Edison and Commission Staff wish, they can
2 cross-examine Mr. Bennett next week to further their
3 misunderstanding that they have with regard to the
4 wireless smart meter or AMI program that is being
5 proposed.

6 In relation to the objection again that
7 parts of the testimony involve hearsay, we will concede
8 that where Mr. Bennett has offered testimony that is
9 arguable medical in nature, that such testimony is open
10 to the objection that is offered by someone whose medical
11 qualifications are not substantiated on the record, and
12 therefore we do not object to striking testimony that may
13 be presented on cross-examination that are arguably
14 medical in nature at that time.

15 The Staff makes the point that issues
16 concerning the scope of the AMI meter program should
17 properly be raised in a general rate case, not in this
18 case. Our response to that, your Honor, is that issues
19 as to the safety and risks of the AMI program have not in
20 fact been addressed in any rate case or in any
21 evidentiary proceeding, and that the Commission has not
22 so far provided any forum for evidence in these matters
23 to be heard.

24 We cite the fact that we and three other
25 petitioners who intended to raise just those issues were

1 recently denied intervenor status by the ALJ and by the
2 Commission in the re-opened general rate case, Case No.
3 U-15768. In consequence of that decision, the Commission
4 has also refused to hear expert medical testimony
5 submitted by Dr. David O. Carpenter who does have the
6 medical qualification to speak to the danger of the smart
7 meters to human health. David Carpenter was going to be
8 presented in this matter and before the Administrative
9 Hearing -- before you, your Honor. But the issues in and
10 the proper forum needed to be presented was in the
11 re-opened general rate case, the remanded case by the
12 Michigan Court of Appeals, which denied us the intervenor
13 status and the misinterpretation of the order by the
14 Court of Appeals. This matter and the forum was proper
15 to provide added knowledge as to the health, safety, and
16 privacy risks of smart meters, and to create a real
17 record, your Honor, with solid evidence.

18 Your Honor, unless all issues and
19 multiple issues are raised as to the health, the safety,
20 and the privacy by the general public in objection, the
21 numerous factors weigh in and are significant to report
22 the unlawful and inappropriate need of the AMI being
23 proposed as a requirement. And unless all issues and
24 multiple issues are raised as to health, safety, and
25 privacy as known by the general public and objection, the

1 balancing test from American Administrative Procedure law
2 applies to the question of due process of law and
3 consideration arising from the Fifth Amendment and the
4 14th Amendment to the United States Constitution.

5 The Staff alleges that issues concerning
6 health effects have been addressed in general rate Case
7 No. U-16472 and again in Case No. U-17000, but that is
8 not true. The fact is that the health effects and the
9 privacy issues have not been addressed in U-16472 or in
10 any evidentiary proceeding. Case U-17000 was not an
11 evidentiary proceeding. A decision by the Commission to
12 accept a Staff report does not amount to a legal finding.

13 We argue that the greater part of Mr.
14 Bennett's testimony is based on his documented
15 qualifications as a Red Seal electrician and building
16 technologist. He is therefore qualified to speak as an
17 expert witness in explaining the cumulative radiation
18 dangers coming from not only the meter but all of the
19 infrastructure components required to support a smart
20 meter system. These are questions of electrical theory
21 and practice, and those parts of Mr. Bennett's testimony
22 that go to these issues should be preserved.

23 Finally as to the hearsay objection.
24 When Mr. Bennett speaks of electrical issues and not the
25 medical issues, he is speaking from his own training,

1 knowledge, and experience as an electrician and
2 electrical consultant, and he is not quoting others who
3 will not be testifying in this case. Mr. Bennett's
4 testimony as presented revealed the need to debate the
5 Opt Out Proposal. The opt out fees proposed do not take
6 into account the liability issues concerning health
7 established by peer review studies. We argue that this
8 will ultimately generate other kinds of liabilities that
9 have not been factored into the general public's best
10 interests.

11 To purport a requirement of AMI opt out
12 fees requires understanding that if nobody ever opted in
13 or was ever required to opt into this technology being
14 radically proposed, then nobody clearly needs to opt out.
15 Having this tariff does not grant such jurisdiction nor
16 grant the utility the right to enforcement.

17 The current tariff as written, the tariff
18 C5.4, Access to Premises, specifically spells out, and I
19 quote, "As a condition of taking service, authorized
20 employees and agents of the company shall have access to
21 the customer's premises at all reasonable hours to
22 install, turn off, disconnect, inspect, read, repair, or
23 remove its meters, and to install, operate, and maintain
24 other company property, and to inspect and determine the
25 connected electrical load."

1 The Opt Out Proposal being presented to
2 the public is a program designed to keep a smart meter on
3 a residential home or commercial property that is being
4 presented as a digital meter. The DTE will not allow a
5 residential customer under the opt out agreement as
6 suggested to keep their analog meter. Again this digital
7 meter is a smart meter with the radio frequency being
8 turned off, whereby at any point thereafter the utility
9 company will place claim that they have a right to update
10 their meter without further consent or authorization of
11 the party. If a party --

12 JUDGE MACK: Hold on, Mrs. Cusumano. How
13 is this relevant to the motion to strike Mr. Bennett's
14 testimony?

15 MS. CUSUMANO: Because they all play
16 together.

17 JUDGE MACK: They all play together; I
18 don't what that means. What I am looking for is the
19 legal argument. I'm trying to avoid getting into facts
20 here. It certainly sounds like you're attempting to
21 testify at this point. Again, you have made your
22 argument that Mr. Bennett's testimony is relevant, it's
23 not hearsay, and he's qualified to provide expert opinion
24 in this proceeding.

25 MS. CUSUMANO: Thank you, your Honor.

1 JUDGE MACK: Is that it?

2 MS. CUSUMANO: That's it, your Honor.

3 JUDGE MACK: O.K. Thank you. I
4 appreciate it, Mrs. Cusumano.

5 Next, Ms. Edwards.

6 MS. EDWARDS: O.K. So I am responding in
7 terms of -- I am not a lawyer and I understand very
8 little of all the different cases and things being cited.
9 But in terms of the motion to strike my testimony, my
10 reason for being an intervenor was based on, solely based
11 on my personal experience with both smart meters and
12 digital meters. And this also has a relationship to
13 cost, which is what I believe this case is about.

14 My testimony was offered to show that
15 smart meters and the cost of smart meters are within my
16 personal experience. The statement was made that it's
17 not an expert opinion. Well, this is my opinion, and I
18 am an expert on my personal experience of what happens to
19 me when I am exposed to these meters.

20 The question of hearsay, what I said was
21 not to prove the truth of the matter, it's part of a
22 narrative and it's offered as background.

23 In terms of redundancy, my testimony is
24 different from that of other testimony because I have a
25 different experience than all of the other people that we

1 offer and that I offer as testimony. So my -- the health
2 testimony establishes the basis for myself to lay out an
3 opinion on the opt out and the narrative associated with
4 the opt out.

5 And really that's all I have to say, that
6 I spoke for myself. I am not an expert but I am an
7 expert on my own experience. I did refer to costs in two
8 places in my testimony, and all the testimony was given
9 as the background for why I do not believe that I should
10 be charged to opt out of something that is dangerous to
11 my health. And so that's all I have to say.

12 JUDGE MACK: Thank you, Ms. Edwards. Just
13 so the record is clear, you filed a joint response to the
14 motions?

15 MS. EDWARDS: Yes.

16 JUDGE MACK: In that response you
17 indicate that you are withdrawing Exhibit 2?

18 MS. EDWARDS: Yes. That was attached by
19 an error.

20 JUDGE MACK: Thank you. Mr. HOLETON.

21 MR. HOLETON: Good morning, your Honor.

22 JUDGE MACK: Good morning.

23 MR. HOLETON: You're going to have to be
24 real patient with me because I had to get real organized
25 here. My argument is to the fact that I would not be

1 here if I had withdrawn my motion to Mr. Sitkauskas's
2 testimony. I would not have to be here if Mr. Solo had
3 not gone ahead and filed to strike my direct testimony.

4 And Mr. Solo, in his motion to strike my
5 testimony, three times he mentioned the health effects,
6 O.K., that is supposed to be in my direct testimony and
7 the technical aspects of the smart meter is supposed to
8 be my testimony. And none of that is in my direct
9 testimony. So if Mr. Solo had obeyed Michigan Rules of
10 Evidence 403, O.K., that -- let me go ahead and quote it,
11 to prejudice the court, waste the court's time, confuse
12 the issue and give a needless presentation about contract
13 testimony, about the health effect, underlying
14 technology.

15 Michigan Rule 403 is to go ahead and just
16 go ahead and eliminate evidence and testimony about
17 things that do not pertain to the hearing. And all of my
18 evidence that I have presented are directly related to
19 the costs of the opt out and the procedure here before
20 the Court. I am willing to go through each page of my
21 evidence to go ahead and document that.

22 And Mr. Solo also claimed that the
23 evidence is hearsay because it does pertain to other
24 people involved. The two parties that are involved in my
25 evidence is the MPSC and DTE Energy, and the product they

1 intend to put on to people's homes and the costs
2 associated with it. So what I intend to argue, O.K., is
3 with the whole MPSC opt out there are hidden costs. And
4 art part of my evidence that I have presented is the
5 Centron meter, which is mandated by the contract that DTE
6 proposes, that every customer who chooses to opt out must
7 sign and agree to and lose the benefits of the open way
8 meter, which by the MPSC says it does not save money.

9 So the whole issue is that the
10 corporation of DTE mandating that consumers take a
11 Centron meter that captures more energy consumption than
12 was measured in the past by the old analog meter, that is
13 my evidence. O.K. The whole purpose of this is that DTE
14 is forcing, not volunteering, allowing people to not
15 accept the open way meter. They must enter into a new
16 contract. The people of the State of Michigan are not
17 able to sit down and negotiate which meter they have on
18 their home, which one saves them money, which meter is
19 more beneficial to them. DTE is mandating that they take
20 a Centron, Diatron Centron meter, which captures more
21 energy consumption than the old meter. They have made an
22 effort to go ahead and stop people becoming aware of
23 this.

24 You could tell by his motion to strike,
25 three times he mentions health effects. If he had read

1 my direct testimony at all, he would know that's not the
2 case. So we come down to the thing that if he says my
3 evidence is hearsay, if he says my evidence is not
4 associated with cost, I am more than willing to have him
5 have Bob Sitkauskas testify, Pat Hudson from MPSC, which
6 MPSC is part of this case, Mr. Isiogu, who testified that
7 smart meters are not mandatory in Michigan and they are
8 the asset of DTE. It is DTE that is choosing which meter
9 goes on our home and whether it's a cost benefit to this
10 or not.

11 JUDGE MACK: I don't want to interrupt
12 you, Mr. Holeton, but I want to go back to the mandatory,
13 that smart meters are mandatory, which kind of runs
14 through your --

15 MR. HOLETON: That's the whole theme of
16 my case, your Honor.

17 JUDGE MACK: And I think other
18 intervenors have also alluded to it. I'm loathe to do
19 this, but Mr. Solo, do you have any response just on that
20 issue, the mandatory nature of smart meters? What if any
21 significance, is it true?

22 MR. SOLO: It's not true in the context
23 that it's described, at least from my opinion, your
24 Honor. It's kind of a --

25 JUDGE MACK: Do we need to develop a

1 factual record on that issue?

2 MR. SOLO: I believe it's completely
3 irrelevant on that issue. There is a discussion of
4 whether something is mandated or not mandated. And there
5 is an apparent search in a number of laws or the
6 inference or application of a number of laws that in my
7 opinion is inappropriate or inaccurate inference from
8 those laws that are discussed amongst not only Mr.
9 HOLETON but a number of commenters that we've heard
10 earlier in this docket as well as in U-17000.

11 The issue is that as a term and condition
12 of service, as one of our customers, the customer would
13 then take the equipment that the Company provides. And
14 that's not a legal mandate that you would find in a
15 statute, that's a term and condition of being a customer.
16 Earlier one of the intervenors mentioned our access
17 rights to validate our meters, to read our meters or
18 inspect them. That's another term and condition for
19 taking electric service.

20 So in that regard, if you want to be one
21 of our customers, then you would take that service
22 consistent with the rules and regulations that were
23 promulgated, that the Commission utilizes, and the rate
24 book that also incorporates the terms and conditions of
25 service. So in that regard, in the last hundred years

1 part of that has been to have a meter located to monitor
2 the nature of the service that is being provided to the
3 home. And over the last hundred years the type of meter
4 that is used has changed a dozen times, historically.

5 This is yet a new change in our meter
6 requirement, that we are implementing throughout our
7 entire service territory. So if you use the term
8 "mandate" in that context, that it's a necessary piece of
9 equipment that the utilities are requiring as a term and
10 condition of service, in that context I would say yes,
11 it's a mandate. But not in the context as discussed by
12 the intervenors with regard to searching for some Federal
13 law that says all Americans shall have smart meters.
14 It's not that type of mandate.

15 JUDGE MACK: And thank you for that. But
16 that's what I was getting at. It appears Mr. Holeton is
17 trying to establish, as a point of law, that smart meters
18 are not mandated legislatively in the State of Michigan
19 or by the Michigan Public Service Commission. I don't
20 want to speak for you. But is that the point, a portion
21 of what your testimony goes to?

22 MR. HOLETON: Your Honor, the whole
23 issue -- and this is what brought me here -- is that I
24 thought the laws of the State of Michigan would protect
25 consumers as me myself. When I called the attorney

1 general's office, O.K., and I asked them if the Consumer
2 Protection Act, PA 331 of 1976, that says they can not
3 confuse me, intimidate me, coerce me into buying a new
4 product I don't want, I figured I could call them, file a
5 complaint, and they wouldn't force me to take the meter.
6 But as the public, the Michigan Public Service Commission
7 and DTE and even Debbie Stabenow, my Senator, says, MPSC
8 has the primary jurisdiction. So we must go through this
9 process before we address it civilly. So who has the
10 authority to force us to take a meter we never contracted
11 for?

12 JUDGE MACK: I understand. That's your
13 argument.

14 MR. HOLETON: That's my argument.

15 JUDGE MACK: What I'm trying to figure
16 out is, can we get a stipulation or can I take notice
17 that there is no legislative enactment or order of the
18 Michigan Public Service Commission that requires the
19 installation of a smart meter? Or is that even something
20 I should be concerning myself with here?

21 MR. SOLO: Your Honor, my belief is you
22 should not be concerning yourself at this juncture.
23 That's evidence that he is trying to provide. If he
24 wants to make the legal argument with that regard, he can
25 do so in his brief and that's legal argument. Here we're

1 talking about admitting the evidence.

2 JUDGE MACK: I understand. But you're
3 trying to strike that evidence that he's attempting to
4 put in. In recognition that Mr. Holeton is not an
5 attorney and to avoid going into the hearing and having a
6 protracted and confused -- in reading the testimony, it's
7 just something I wondered if I could take notice of it or
8 we could stipulate to?

9 MR. SOLO: I don't think so, your Honor.

10 JUDGE MACK: I understand.

11 MR. SOLO: There's a lack of, in my
12 opinion there's a lack of clarity or precision in the
13 argument that would even put me in a position to be able
14 to stipulate to it, and there also appears to be a
15 difference of what I'll call approach or interpretation
16 of those laws that are discussed on that subject.

17 JUDGE MACK: And obviously you would
18 address that in your brief.

19 MR. SOLO: If necessary, your Honor.

20 JUDGE MACK: What I wanted to avoid was
21 having a witness attempt to testify to that. Because
22 Mr. Holeton, witnesses don't testify to the law. The
23 parties argue the law. I find the law. I don't need an
24 expert to tell me the law.

25 But Ms. Barone, I believe you had

1 something you wanted to respond to.

2 MS. BARONE: Just briefly. I think a
3 problem with the testimony is that it offers legal
4 opinion that can be done in briefing. Staff does not
5 agree with the overall assertion that that makes sense in
6 terms of Commission ratemaking, but we'll address that in
7 our brief. But that is the reasoning behind our motion
8 to strike. I don't believe there's any factual context
9 that needs to be testified to. I think the legal issues
10 can be analyzed in terms of the statutes governing
11 ratemaking in the overall ratemaking context. So I don't
12 think there's any factual information in the testimony
13 that would lend any, as minimal as it might be, to a
14 decision on the legal issues.

15 JUDGE MACK: Thank you. Again the reason
16 I brought it up is, we have got affidavits from you and
17 Mrs. Holeton concerning a legal issue. You've got some
18 law attached, and I was just trying to see if we could
19 maybe narrow that down and get that on point.

20 MR. HOLETON: Well, your Honor, like I
21 said, we have -- I am trying to get it as legal as I
22 possibly again, O.K. Because I brought like MRE 404(b)1,
23 prejudicial -- the purpose of a relevant issue of fact at
24 trial, sufficient to outweigh the danger of unfair
25 prejudice, O.K., MRE 404(b)1.

1 You know, I'm rattling on here, but the
2 whole point is, the basis of the cost of the Opt Out
3 program is -- they're supposed to be able to recover
4 their costs, DTE is, and it's supposed to be reasonable.
5 Everything about this is supposed to be reasonable to the
6 consumers. It's not supposed to be lawsuits and
7 hardships. It's not supposed to be intimidation. It's
8 not supposed to be corporate legalese against the average
9 consumer about the simple fact that he wants electrical
10 energy on his home. And this is what it's come down to.

11 I mean DTE, by my evidence that have I
12 presented, O.K., had seven of their employees go ahead
13 and send out letters to over 300 communities warning them
14 about me and my wife coming there as misinformed
15 advocates against smart meters and warning the cities
16 that we will disrupt their meeting. Now this is
17 documentation that they gave me in my discovery. They
18 listed those seven names. I haven't called them as
19 witnesses because I didn't think I needed to. But you
20 know, but all this, like the You Tube video, where Bob
21 Sitkauskas said it's public knowledge, out in Shelby
22 Township, that smart meters are not mandatory in Michigan
23 as they are in California, Texas, by the state. And this
24 is the thing. People are confused. I get calls from all
25 over the country about how come they're mandating them in

1 Michigan when they're not mandatory? It's confusing as
2 all get out.

3 Like I said about the PA 331 confusion,
4 making us take a contract we don't know anything about,
5 behind closed doors, because the MPSC is an intermediary.
6 We should be able to sue, just go to the attorney general
7 and say I don't want it. The attorney general sits on
8 his hands too and says we've got to wait and see what the
9 MPSC says.

10 JUDGE MACK: And I appreciate that.

11 MR. HOLETON: I didn't mean to get off on
12 a tangent.

13 JUDGE MACK: But what I'm dealing with
14 now is, I've got a motion to strike your testimony under
15 the contention that in part it's not relevant, that it
16 contains hearsay, and it contains opinion that you are
17 not qualified to give. And if we could get back to that,
18 that very narrow issue.

19 MR. HOLETON: Well, I am willing, like I
20 said. If the MPSC would have Ms. Flores go ahead and
21 testify to the fact that the smart meter, excuse me, the
22 AMI meter belongs to DTE, it's their asset. This is the
23 thing I want to set up right with all this argument, that
24 there is there is no mandate, Federal or State, this is
25 the property -- the meter is the property of DTE Energy

1 only.

2 JUDGE MACK: If you could ask a witness
3 that question and get an answer, would that satisfy?

4 MR. HOLETON: Well, this is what I was
5 hoping Mr. Solo would provide, or Bob Sitkauskas.

6 JUDGE MACK: Well, Mr. Solo is not going
7 to testify.

8 MR. HOLETON: I'd like to have Bob
9 Sitkauskas testify to that fact, and Mr. Isiogu or Pat
10 Hudson of MPSC testify, like they did out there in
11 Ypsilanti.

12 JUDGE MACK: Well, I'm not sure --I
13 assume Mr. Sitkauskas is going to testify.

14 MR. SOLO: He'll be available for
15 cross-examination next week, your Honor.

16 MR. HOLETON: See, this is the whole
17 thing. I need -- I did not litter you with the 13
18 witnesses that were in Ypsilanti, O.K. I did not ask to
19 bring the Consumers Energy, the MPSC, DTE, Mr. Meltzer,
20 O.K., and my wife to testify. We were there when they
21 said they're not mandatory in Michigan. That's what
22 those affidavits --

23 JUDGE MACK: And that's what I was
24 getting at. I was trying to see, mandatory -- you have
25 be careful with that because as in Mr. Solo's response,

1 there is some variations. I was looking at it
2 legislatively or administratively. And you are certainly
3 free to argue that all day long. That's what your brief
4 would do. Where you're running into an objection is when
5 you attempt to testify that this is a fact. That is
6 where you are running into the objection.

7 MR. HOLETON: Well, this is why I need to
8 have the MPSC, Mrs. Flores or somebody from them, argue
9 the case, whether they are mandated by the State of
10 Michigan or the Federal Government, or whether they are
11 the assets of DTE and it's their sole jurisdiction to
12 provide a cost effective meter for the consumers of the
13 State of Michigan.

14 JUDGE MACK: Well, with all due respect,
15 I don't know if Ms. Flores is qualified to give that
16 opinion either. But you, again --

17 MR. HOLETON: Well, the evidence that Ms.
18 Flores sent to me says that they are the asset of DTE.
19 That's from the MPSC. Then I have the video of Bob
20 Sitkauskas from Shelby Township. I could present the
21 whole video, the five minutes from the You Tube that says
22 it's not mandatory in Michigan like it is in Texas and
23 California. That's part of my evidence that he wants to
24 throw out.

25 JUDGE MACK: You can certainly try. But

1 again, the witness would be here, you'll have the ability
2 to cross-examine that witness. So I would think that may
3 establish what you're trying to establish.

4 MR. HOLETON: I just wish the Court would
5 not go ahead and strike any of my evidence until we have,
6 until we're able to present it in a hearing and with
7 witnesses testimony. Because every bit of my evidence is
8 related to whether consumers should have to pay for
9 higher costs due to the Opt Out, O.K., that's presented
10 by DTE. Whether the high cost is in the Centron meter or
11 is because not enough people have become aware of the Opt
12 Out Program presented by DTE because of the numbers,
13 O.K., they use to claim that there's only eleven hundred
14 complaints and there are seven hundred thousand happy
15 campers about the smart meters. Which they have not
16 provided any documentation that those customers,
17 consumers that were forced to take the open way meter and
18 not know about the benefits and costs of the AMI program,
19 whether they're happy consumers or not. This is the
20 issue.

21 JUDGE MACK: Well, I respect the
22 argument, Mr. Holeton, but you have to respect that my
23 job is to create a record, to protect the record, and to
24 apply the Michigan Rules of Evidence and the
25 Administrative Procedures Act and the Commission's Rules

1 as it regards evidentiary standards. That's what we're
2 doing here.

3 MR. HOLETON: I understand.

4 JUDGE MACK: So I understand. And I did
5 try to see if we could maybe establish that through
6 stipulation or notice, but it appears we can't do that.
7 But Mr. Sitkauskas will be available for
8 cross-examination and you have the ability to ask him
9 questions.

10 MR. HOLETON: Well, because the MRE 401,
11 all evidence is relevant unless there are other
12 objections to it, O.K. My evidence is relevant to the
13 complete cost of the Opt Out. There is no health effect,
14 there is no technical aspect. I'm going to go ahead and
15 tear a meter apart and say this is why it costs more.
16 The evidence is presented by the Itron/Centron
17 Corporation, O.K., which speaks for itself. And I don't
18 have to speak as a technical expert. Anybody can go on
19 there and go to that website and look up the same thing.
20 It's public knowledge. And this is the whole thing.

21 We have to go ahead and allow this
22 evidence on in because it is step-by-step documentation
23 of the cost and non-cost benefit of the Opt Out Program
24 related to the AMI program and how it affects the
25 consumer. If you go through each piece of the evidence,

1 O.K., related there, I said I'm willing to discuss it. I
2 need to go ahead and have this evidence in the hearing so
3 that we can go ahead and address it. If Mr. Solo gets to
4 strike it because he says it's about health effects and
5 the technical aspects, I mean --

6 JUDGE MACK: Well, let's be clear. Mr.
7 Solo has indicated that that was mistaken, and he is
8 withdrawing any and all references in his motion to that.
9 And I believe he -- and I hate to speak for him -- but he
10 is focussing on relevance, that it doesn't go to cost of
11 service principles, and that it is hearsay.

12 MR. HOLETON: Well, your Honor, as I
13 testified, they chose what's more profitable for the
14 corporation, not what's been more beneficial to the
15 consumer. They can get their costs -- they can get the
16 costs reimbursed through the consumer for all that meter
17 instead of going with a volunteer program, which the
18 17000 was supposed to go ahead and enact that each
19 consumer who wants to save money should be offered a
20 smart meter to do so. And that would pay for the program
21 itself.

22 They chose to go with a mandate of the
23 corporation, not in the Federal or State, that says under
24 Public Law 109.58 of 2005, that says it's a voluntary
25 program. That's the issue. I know that they argue that

1 that is a different case, but the whole point of this is
2 that the only reason we have the Opt Out Program here
3 today is because, as Bob Sitkauskas testified in his
4 direct testimony, that the 22 resolutions in the cities
5 and townships and the two counties in Macomb and Oakland,
6 all those resolutions wanted an opt out, every one of
7 them, that's his testimony. And now he claims that
8 almost 800,000 consumers that have an open way meter love
9 it. And he has not provided that documentation. We have
10 provided 22 resolutions and moratoriums in cities and
11 townships and two counties, and every one of those wants
12 to address the Opt Out.

13 JUDGE MACK: But you're getting to the
14 facts now. You're actually arguing the weight of
15 Mr. Sitkauskas's testimony. And again, you have made
16 your point on admissibility. Your contention is it's
17 relevant, it's not hearsay, and I don't know if there was
18 an 801 objection, but if there is, that you're qualified.

19 MR. HOLETON: There is an 801, let me
20 find it. Rule 803, number 1, present tense impression of
21 statement describing or explaining an event or condition
22 made... while declarant was proceeding the event or
23 condition or immediately thereafter. That has my
24 hearsay. If he wants to address the one out in Ypsilanti
25 where I talked to Mr. Isiogu and Pat Hudson, we were

1 present. That what the affidavits attempt to. I was
2 there in Shelby Township with Bob Sitkauskas when he went
3 ahead and declared there is no mandate in Michigan like
4 there is in California and Texas. I was present during
5 that. I was out there in Ypsilanti Township when Bob
6 Sitkauskas testified, answered my one question: Are
7 smart meters mandatory in Michigan? And that evidence
8 was in the record in Ypsilanti Township, which I provided
9 that.

10 JUDGE MACK: Well, it is not in the
11 record here. There is no record outside this room. The
12 record is going to be here.

13 MR. HOLETON: I'm just talking about the
14 relevance of the evidence I provided because it is --

15 JUDGE MACK: Excuse me. I'm -- Go ahead,
16 Mr. Holeton. We got to get to the other people, so go
17 ahead.

18 MR. HOLETON: I'm going to wrap up. All
19 the evidence I presented is relevant, O.K., because you
20 know, because we documented every bit of it. From the
21 video to the testimony from Ypsilanti Township, to the
22 letter from MPSC, to Mr. Sitkauskas's testimony. And I
23 really request that Mr. Solo's motion to strike my
24 evidence is denied.

25 JUDGE MACK: Thank you, Mr. Holeton.

1 MR. HOLETON: Thank you, your Honor.

2 MS. BARONE: Your Honor, may I say one
3 quick thing?

4 JUDGE MACK: Sure.

5 MS. BARONE: I just want to be clear that
6 our witness will not be able to answer a legal question.
7 Our witness's testimony is designed as to the
8 reasonableness of that tariff.

9 Our objection to Mr. HOLETON's testimony,
10 everything he said regarding whether the law requires
11 this or not can be put in his brief. It's not as if he
12 would not be able to make these arguments. It simply
13 does not belong in testimony. And in a similar fashion,
14 our witness is not going to reach an overriding legal
15 opinion regarding a matter that could easily take 15
16 pages of legal briefing to analyze. So I just want to be
17 clear on that.

18 JUDGE MACK: Thank you. And Mr. HOLETON,
19 what Ms. Barone is saying, you may be able to ask the
20 question but you can probably expect an objection to the
21 question. And then we'll argue that, too. But that is
22 noted, Ms. Barone.

23 Next we have Ms. Kurtz.

24 MS. KURTZ: Linda Kurtz. The motion to
25 strike the testimony of Matthew Ben-Bassat, Loretta

1 Yaskovich, Rebecca Morr, Karen Strode, Leslie
2 Panzica-Glapa, Cynthia Edwards, and myself, Linda Kurtz.

3 JUDGE MACK: O.K. Let's go off the
4 record.

5 (Brief discussion was held off the record.)

6 JUDGE MACK: Back on the record. Ms.
7 Kurtz, you may proceed.

8 MS. KURTZ: First, the claims by Detroit
9 Edison that the testimony of all witnesses of Edwards and
10 Kurtz should be stricken because they do not reside at
11 the same address as the intervenors and that their
12 testimonies are therefore petitions to intervene and are
13 without foundation. Nowhere in the Michigan Rules of
14 Evidence or Rules of the Commission does not state that a
15 witness must live at the same address as the person on
16 whose behalf they are testifying.

17 The testimony of the witnesses was
18 submitted as testimony, not as petitions to intervene,
19 and each witness states in their testimony that they are
20 submitting the testimony on behalf of the intervenors.

21 I want to address the scope of the case
22 which has been brought up by Ms. Barone and Mr. Solo. In
23 this case the Commission is charged with reviewing the
24 Opt Out proposal Detroit Edison submitted on its
25 September 11, 2012 Order of the Commission in U-17000.

1 The Commission, based on the evidence,
2 could accept the proposal in its entirety, it could
3 reject it entirely, or it could modify it. This includes
4 reviewing and signing on the allocation of costs of the
5 opt out, the amount of the opt out, the type of meter or
6 meters to be used in the opt out, the inclusion of
7 businesses in the opt out, and the contents of the
8 proposed tariffs. Depending on how the Commission
9 decides to allocate costs of the opt out, health effects
10 may also have a bearing on whether the customer must
11 offer a reason to opt out. Staff and Detroit Edison
12 repeatedly assert that the only thing additional is the
13 cost of the opt out and who should bear that cost. But
14 as we see it, there are other significant factors
15 involved in Detroit Edison's proposal.

16 O.K. Turning to the more specific
17 objections that have been raised. I want to address the
18 question of lay opinions and preliminary matters. Lay
19 opinions are allowed under MRE 701 when based on the
20 personal perception of the witness. The purpose of the
21 testimony is to offer a lay opinion on the smart meters.
22 When the opinion is within the personal perception of the
23 witness, it is a preliminary matter under MRE 104(a) as
24 it determines whether the evidence is admissible. The
25 Rules of Evidence do not apply to preliminary matters.

1 The vast majority of the testimony is offered to show
2 that smart meters and the cost of smart meters are within
3 the witness's personal perception.

4 In People v Barrett, 480 Mich 125, 2008,
5 the Michigan Supreme Court has held that under MRE 104(a)
6 "a trial court may consider any evidence regardless of
7 that evidence's admissibility at trial as long as the
8 evidence is not privileged, in determining whether the
9 evidence proffered for admission at trial is admissible."
10 Our main argument as to all of the testimony that we have
11 submitted is that it is admissible under MRE 104(a) as a
12 preliminary matter.

13 The Staff claims that the testimony
14 offered by a witness who is an expert is opinion given by
15 a person not qualified as an expert. The opinions are
16 not expert opinions but were offered as lay opinions
17 based on a personal perception of the witnesses. This is
18 covered under MRE 701. Each witness has experience with
19 smart meters, and each has had a distinct personal
20 experience with them. This experience has left each of
21 these witnesses with an impression that an opt-out should
22 exist and that they should not have to bear the cost of
23 the effects of the smart meters on their person.

24 Just to cite a court case as well that
25 has bearing on this matter, in Chastain v General Motors

1 Co., 254 Mich App 576, decided in 2012, a police officer
2 was allowed to give a lay opinion that the plaintiff was
3 not wearing a seatbelt even though the officer did not
4 witness the act and was basing his testimony on his
5 personal perceptions of the accident scene.

6 In the alternative, should the Court not
7 accept our arguments under MRE 104(a) and 701, our
8 response to the motions to strike is the following:
9 First under relevance. The *Morales v State Farm*, 279
10 Mich App 720, decided in 2008. To be relevant, facts
11 must be material. The materiality is a relation between
12 the propositions for which the evidence is offered and
13 the issues in the case. The material facts need not
14 directly prove an element of a claim or defense as long
15 as it's within the range of litigated matters. The
16 witness's testimony presents relevant evidence having the
17 tendency to make the existence of many facts that are of
18 consequence to the determination of this action more
19 probable or less probable than they would be without the
20 evidence. In other words, the evidence is important to
21 the decision in this case on the many different factors
22 that are to be decided.

23 The adoption of opt-out, who should pay
24 the costs and how much they should pay, are issues in
25 this proceeding. The customers will take advantage of

1 the opt out. This opt-out would reduce the costs that
2 AMI imposes on them, including in terms of health costs
3 and the loss of enjoyment of their property.

4 The evidence also tends to show that if
5 customers perceive that AMI is forcing them to incur
6 costs, including health costs, then it's more likely that
7 customers should not have to bear the costs of opting
8 out.

9 This testimony tends to show that some
10 customers would prefer an analog alternative to smart
11 meters and the non-transitional meters due to the various
12 costs being imposed on them. The testimony tends to show
13 that there should be included in the opt-out the
14 customer's experiences with smart meters and the costs
15 associated with them that are not limited to the home.
16 This relates to the scope of an opt out and is within the
17 range of litigation matters.

18 And I just want to remind everyone at
19 this point, DTE, Detroit Edison, has presented a proposed
20 opt-out. It hasn't presented something that is the end.
21 This is what the Commission is charged with deciding on.

22 Detroit Edison contests the weight that
23 these opinions should be given. That does not mean they
24 are not within the range of litigated issues, or of
25 admissible evidence.

1 The Commission did not explicitly rule
2 that the health costs of customers are not relevant to
3 who should bear the costs of the opt-out. The Commission
4 called the Staff report a point of departure for further
5 action and discussion on 9/11 in U-17000. The Commission
6 stated that it expected utilities to continue to refine
7 the scope of and quantify the costs and benefits of AMI.
8 Thus the issue of customer's costs is not closed.

9 And contrary to what Ms. Barone says, the
10 scope of this tariff goes forward beyond the parameters
11 of any usual or reasonable tariff.

12 The testimony of our witnesses will
13 greatly help the Administrative Law Court and the
14 Commission in determining the final order of the opt out.
15 Very importantly, very few places were installed with
16 smart meters prior to the Commission's issuance of this
17 report in U-17000. No studies have been done on the
18 health effects of the smart meter, on individuals have
19 been done to date with to add to this discussion.

20 The witnesses' testimony provides
21 information on what can happen in real life situations,
22 not in a laboratory, when smart and non-transmitting
23 meters are involved at people's homes and businesses
24 throughout Michigan. The testimony provides evidence
25 from people directly experiencing the effects of

1 non-transitional meters on their health. And this
2 testimony suggests that analog meters rather than digital
3 meters of any kind should replace the smart meters.
4 Health issues with digital meters were not addressed in
5 the previous Commission proceeding. And the report
6 issued in U-17000 dealt with only the effects as to radio
7 frequency emissions.

8 Give me a second here. The testimony as
9 submitted discusses whether the charges are reasonable,
10 and opines that it is unreasonable. And I have cited
11 that in the written testimony that I have presented. I
12 cited it in a couple of places. And if the Court wants
13 me to make those citations for every motion to strike, I
14 can do that.

15 JUDGE MACK: No, that's not necessary. I
16 think the record is clear on that.

17 MS. KURTZ: Right. Even if the testimony
18 is considered irrelevant, the Commission's rules give it
19 discretion to accept that evidence as the Commission
20 would may use in the Commission Rule 460.17325. And it
21 was also addressed in the testimony.

22 I guess I'll ask the Court whether -- I
23 have prepared some spots where I have directly addressed
24 relevance. Neither Staff nor Detroit Edison cited any
25 specifics except in those couple of places about whether

1 its charges were discussed. They just wanted to throw
2 the testimony out wholesale. So if the Court feels that
3 it would be beneficial for me to cite some specific
4 instances about how the testimony is relevant, I could do
5 that.

6 JUDGE MACK: Well, I believe your brief,
7 which is rather comprehensive, first of all makes the
8 argument that the motion is not specific or motions are
9 not specific. And I believe you also have in that brief
10 gone through where you believe or give instances of how
11 it is relevant, so I don't think that's necessary. Again
12 that's up to you.

13 MS. KURTZ: O.K.

14 JUDGE MACK: That's strategy.

15 MS. KURTZ: If you don't feel that I need
16 to, then I won't. But know that I do have specific
17 instances, and if those are needed in some kind of way I
18 can give them.

19 JUDGE MACK: I'm not trying to pre-judge
20 the motions in that they weren't specific; that was your
21 argument. There are certain of the motions that seek to
22 strike the entirety of testimony.

23 MS. KURTZ: Right.

24 JUDGE MACK: It's your contention that
25 none of it should be stricken.

1 MS. KURTZ: It's my contention that
2 Exhibit 2 of Cynthia Edwards' testimony is fine to be
3 stricken. That Exhibit 2 of Leslie Panzica-Glapa's
4 testimony can be stricken. And despite what we had said
5 in our written response under the hearsay objection, we
6 actually have done a little bit more research and feel
7 that not all of -- we had agreed that some of the other
8 testimony could be stricken, but we would at this point
9 argue differently in that the hearsay rule doesn't apply.
10 And I can go into that a little bit more.

11 JUDGE MACK: Well, if you feel it's
12 appropriate, here is your chance to make your argument.

13 MS. KURTZ: O.K. I'll give it my best
14 shot. Well, first I want to address something that Ms.
15 Barone said in her oral argument here about hearsay and
16 why it would be unfair. The court rule doesn't require
17 the availability of the person whose statements are
18 quoted in this. So I'm a little bit confused about her
19 statement about that. So I think that that permits some
20 of this testimony, that alone permits some of this
21 testimony to be admitted.

22 O.K. So I'm just going to read here
23 something that I wrote up for this oral argument, which
24 is going to restate a little bit of what I said.

25 In some instances in our response we

1 agreed with Edison and Staff that the testimony was
2 offered to prove the truth of the matter asserted. We
3 withdraw that assertion as it was based on an incomplete
4 understanding of MRE 104(a) and MRE 701, which I already
5 addressed a little bit earlier in this oral argument.
6 All the testimony Staff and Edison object to as hearsay
7 are preliminary questions under MRE 104(a). All the
8 testimony objected to as hearsay is part of a narrative
9 and is offered as background. So addressing the issue of
10 redundancy and repetitiousness, again that's been
11 addressed in the written testimony.

12 I wanted to point to a couple of more
13 cases that also address this and go to our argument, to
14 support of our arguments. *Plymouth Township v Wayne*
15 County Board of Commissioners, 137 Mich App 738, 1984,
16 stated that -- this is not a quote -- this type of motion
17 is generally only granted when there is other evidence in
18 the record that shows the same thing.

19 *People v Hill*, 167 Mich App 756, 1988, is
20 a case where prior testimony read into the record was
21 redundant when the witness showed up and reiterated the
22 testimony in person. In that case the Court stated that
23 -- again not a quote -- testimony must be substantially
24 the same, not merely similar for it to be redundant. And
25 these were in addition to the cases addressed more

1 thoroughly in our written response.

2 And in then People v Barker, 101 Mich
3 App 599 at page 603, decided in 1980, also addresses the
4 question of foundation testimony, stating that testimony
5 establishing a fact necessary for admissibility is again
6 something that is permissible and not redundant.

7 And then another case that we'd like to
8 cite in support of our arguments under MRE 403 is that
9 MRE 403's balancing test is substantially the same as
10 Federal Rule of Evidence 403, and it applies to jury
11 trials but not non-jury trials. Schultz v Butcher, 24
12 F3d 262 at page 632, 4th Circuit, 1994. Again citing to
13 both statute and Commission rule, Statute 24.275 of the
14 Michigan Compiled Laws, Rule 460.17325 of the Commission,
15 Commission proceedings are non-jury trials.

16 Let me see if there is anything else that
17 I would like to say. Yes, regarding expert opinion. The
18 Staff has claimed that the testimony given by the
19 witnesses offers expert opinions that the witnesses are
20 not qualified to give. However, a lay non-expert witness
21 may give opinions or make inferences that are rationally
22 based on the perceptions of the witness and are helpful
23 for a clear understanding of the witness's testimony or
24 the determination of the fact at issue, again reciting
25 MRE 701. Thus, a lay witness may give opinion testimony

1 where the opinion is based on her professional or
2 personal experience.

3 Again there was nothing specific cited in
4 the testimony that -- or in the motion to strike that
5 Staff gave. And again, if you need further argument on
6 that, I can give that.

7 JUDGE MACK: Again I believe your
8 response is very detailed on that point.

9 MS. KURTZ: O.K. Well, I think that's
10 all the remarks that I have.

11 JUDGE MACK: Thank you, Ms. Kurtz. That
12 leaves Mr. Meltzer. Mr. Meltzer.

13 MR. MELTZER: Yes, sir.

14 JUDGE MACK: At some point I would like
15 to address your various filings. But why don't you start
16 your argument on the motions, and then we'll try to
17 figure out the rebuttal and surrebuttal.

18 MR. MELTZER: Richard Meltzer,
19 representing myself. I'd like to make just a couple of
20 short comments as a preface, and I want to read several
21 sentences here from a paper I submitted in Case U-17000.

22 JUDGE MACK: Hold on. You have to speak
23 loudly, and if you could stand up.

24 MR. MELTZER: One of the things that has
25 bothered me over time in regard to this case is the way

1 the case has decomposed and the big picture is never
2 really looked at, discussed, or confronted, at least from
3 my personal perspective.

4 So quoting myself here. There is a
5 broader issue at work here. It is evident we have really
6 become a society dependent upon wires, to a society
7 hard-wired that is becoming rapidly replaced by a stream
8 of RF radiation. That's radio frequency radiation. But
9 as a nation we never made a conscious decision to do so.
10 There has been no public discussion or debate, and no
11 acknowledgment of the health risks potential, nor the
12 conflict between business interests and public health.
13 O.K.

14 I think that that speaks to a lot of what
15 is going on here. Fundamentally there is a lot of
16 discussion about the change in the meter and some even
17 arguable discussion about how many times this happened
18 over the hundred years and all that. But what is not
19 comprehended is, this meter change is a fundamental
20 paradigm shift in technology. It is as different as the
21 information age is to the typewriter, O.K. And there are
22 30 capabilities that these new meters have, the data
23 collections, et cetera, the tying in to the home of the
24 future, the smart appliances, the feedback networks, the
25 data collections on our privacy and so on and so forth.

1 There is no discussion about this stuff.

2 Similarly, one of my frustrations with
3 DTE is, I have raised the question a number of times and
4 I have never gotten a straight answer: If you live in an
5 apartment or a condo complex and you happen to have a
6 unit located in close proximity to the three, four dozen
7 meters that are aggregated in a cluster, the way they
8 typically are, and you want to pay to get your meter
9 exempt, stay with your analog or stay with the
10 alternative meter, whatever that might be, how is that
11 going to work? And for what purpose?

12 JUDGE MACK: Well, Mr. Meltzer, you're
13 asking questions. This is not the time. Nobody is going
14 to answer your questions.

15 MR. MELTZER: Well, it's rhetorical.

16 JUDGE MACK: Well, nobody is -- I don't
17 want to hear rhetorical questions.

18 MR. MELTZER: O.K.

19 JUDGE MACK: You filed direct testimony,
20 you filed rebuttal testimony. We have two motions to
21 strike portions of that testimony. Your response to
22 those motions specifically, the admissibility of that.

23 MR. MELTZER: O.K. I'm on my way there.
24 And I am here.

25 JUDGE MACK: O.K.

1 MR. MELTZER: O.K. There are really two
2 points that were cited in my submissions, and they were
3 cited by DTE and the Staff of the MPSC. I cited various
4 authorities, and this was called hearsay. But in my
5 response I wrote research and science are built on the
6 work of others. Respected journals publish the work of
7 credible researchers in order to distribute knowledge and
8 facilitate learning within communities of practice.
9 Researchers, as a matter of course, cite colleagues and
10 other practitioners as part of their work. Such citings
11 are not considered hearsay.

12 Consider that the summary research
13 evaluation paper submitted in Case U-17000 by MPSC Staff
14 and accepted by the Commissioners cited considerable
15 research by others. Was that research hearsay, I ask
16 rhetorically. There seems to be some cherry picking or
17 some, you know, they get to decide when it's hearsay and
18 when it's not hearsay. When I cite a credible source, an
19 authority in the industry or an agency, they say it's
20 hearsay. They cherry pick the research on that paper and
21 they submit that as the basis that the decisions are
22 supposed to be made. I don't get that.

23 But apparently Rule 322 provides that the
24 Rules of Evidence are applicable here. And that provides
25 that all evidence which is relevant is admissible. So I

1 would suggest that in fact these submissions, the citings
2 of industry experts, in fact should be admissible.

3 Another point. Well, this does get to
4 costs. I mentioned the thing about the condo and the
5 apartment dwellers. It directly speaks to the cost
6 issue. I don't know why somebody would feel that they're
7 getting what they paid for if they choose to pay to opt
8 out, and they're one of 36 meters in close proximity and
9 you turn off one and are bombarded by the other 35.

10 One of the other issues that's always
11 been avoided, never directly addressed by the MPSC or any
12 other authority on the other side, is the notion of
13 cumulative effect of these things. They always want to
14 take a single meter and test it in isolation. And even
15 there I won't get into any detail here, it's not the
16 purpose, but the methodology for testing these meters is
17 quite suspect and subject to criticism. But even with
18 that said, it's still one meter and it doesn't take into
19 account the wide array of meters in many of these
20 environments. Or if you live in close proximity to a
21 neighbor, you may be standing at you kitchen window and
22 if you have a neighbor very close to you, their
23 electrical meter may be staring you in the face, et
24 cetera.

25 Now, the one other issue that had come up

1 was the notion of the surrebuttal, and Mr. Solo had asked
2 that my surrebuttal be dismissed. I inadvertently -- due
3 to my lack of knowledge -- originally submitted a
4 rebuttal to a rebuttal. Essentially and effectively it
5 was the surrebuttal. But when I learned later that you
6 had to formally call it surrebuttal, I recast it, the
7 text and criticisms was all the same, and retitled it and
8 sent it out again, and it was called a surrebuttal. I
9 think it should stand because it was simply an
10 administrative little glitch, as it were.

11 JUDGE MACK: Well, let's get to that.

12 MR. MELTZER: O.K.

13 JUDGE MACK: The motion seeks to strike
14 the filing made on December 6th under docket 199, under
15 the argument that it's surrebuttal. I think Mr. Meltzer
16 just agreed that it is in fact surrebuttal. So on
17 January 3rd Mr. Meltzer filed, re-filed the testimony and
18 labeled it surrebuttal. There was no motion, no request
19 made to file surrebuttal.

20 Mr. Solo, do you still object to that
21 filing?

22 MR. SOLO: I do, your Honor. I also
23 disagree with the description that was just provided to
24 your Honor. The testimony described as rebuttal
25 testimony had a 5:00 p.m. deadline. It appears that

1 Mr. Meltzer took the benefit of reading that testimony
2 and then -- I apologize for not knowing the specific
3 time, but roughly after 11:00 p.m. on that very day, then
4 filed a response to that testimony, which in my mind is
5 an attempt to take a second bite of the apple. That
6 wasn't provided by the schedule that was adopted and
7 agreed to by the parties in this case.

8 JUDGE MACK: That would be the
9 surrebuttal.

10 MR. SOLO: Well, there are two separate
11 documents. I appreciate that they are largely similar,
12 but they are in fact different. Their content is
13 different. The first four paragraphs of the first page
14 have the different sentences than the original submitted
15 document. And then it appears that this counter argument
16 was only created after an e-mail was sent to all parties
17 of record with regard to the inappropriateness of filing
18 surrebuttal without filing a motion.

19 So as we stand here today, there is no
20 valid motion requesting that happening. The fact that it
21 was an attempt at a second bite of the apple is
22 prejudicial to my client, and therefore it should not be
23 admitted.

24 JUDGE MACK: Thank you. So you are
25 renewing your motion in effect to cover also Docket No.

1 222, the January 3rd filing entitled Surrebuttal.

2 MR. SOLO: The one that was filed without
3 a motion requesting it.

4 JUDGE MACK: Yes.

5 MR. SOLO: Yes, your Honor.

6 JUDGE MACK: Ms. Barone, anything?

7 MS. BARONE: I would concur with Edison
8 on that. The response that Mr. Meltzer made makes some
9 attempt to justify or ask for the surrebuttal by saying
10 that -- I presume the new surrebuttal -- by saying that
11 it'll provide additional clarification. But it's not any
12 more specific in that on why we should extend the record
13 further.

14 JUDGE MACK: Thank you. Mr. Meltzer,
15 what we have got is an objection to your January 3rd
16 filing under the argument that you did not request to
17 file surrebuttal as the rule so requires. Any response?

18 MR. MELTZER: Well, your Honor, I did
19 make some inquiries as to the procedure that one follows
20 in that regard, and I was left with the impression, not
21 being an attorney, that it was filed in much the manner
22 that we filed most of these other documents that we have
23 been dealing with. Also there is a reference to a
24 5:00 p.m. deadline. I know of no such deadline such as
25 it relates to surrebuttal. But I thought for the purpose

1 of e-dockets, you have till essentially midnight on the
2 deadline date.

3 JUDGE MACK: So basically you're saying
4 you did not know you had to request to file surrebuttal
5 and you did so in good faith.

6 MR. MELTZER: Yes. I thought that the
7 submission was in fact at your discretion, and therefore
8 one and the same with making the motion.

9 JUDGE MACK: O.K. Thank you. I will
10 take that up when we -- when I deal with all the motions.
11 Do you have anything else, Mr. Meltzer?

12 MR. MELTZER: I may be picking a nit
13 here, but if the detail of, the precise detail of the
14 submission is a deciding factor, I know this because I
15 had trouble at first because the computer I was using,
16 but Mr. Solo's submission was submitted in a zip format,
17 not a PFD format, and that made it very difficult for me
18 to get that document to begin with.

19 JUDGE MACK: I will tell you this,
20 nothing is going to stand and fall on the format with
21 which things were filed. But your position is noted.
22 Why don't we -- Do we have any other intervenors?

23 (Raising of hand.)

24 JUDGE MACK: Yes?

25 MS. SCHMIDT: Yes, your Honor. My name

1 is Sharon Schmidt.

2 JUDGE MACK: O.K. Ms. Schmidt, would you
3 care to respond to the motions?

4 MS. SCHMIDT: If I can yes, please.

5 JUDGE MACK: Go ahead.

6 MS. SCHMIDT: The first thing is, there
7 was a problem in the date that it got processed in. I
8 sent it out on December 6th, going back on the records.
9 Everybody received it except for the docket for the
10 Michigan Public Service. So when I re-filed, it went on
11 to the 8th so that they considered late. But proof of
12 service shows that it was on time. So maybe I can find
13 out if you're going to stick with which date, which would
14 it be.

15 JUDGE MACK: I will not deny this motion
16 because you filed it on December 8th.

17 MS. SCHMIDT: I'm sorry.

18 JUDGE MACK: I will not deny -- I will
19 not grant this motion due to the fact that you filed on
20 December 8th instead of December 6th.

21 MS. SCHMIDT: Well, what it was, I had
22 rebuttal testimony from going back in November and what I
23 did is, I --

24 JUDGE MACK: You won that point, Ms.
25 Schmidt.

1 MS. SCHMIDT: O.K. Thank you.

2 JUDGE MACK: So when you win, you have to
3 stop. Because you can argue yourself out of a win.

4 MS. SCHMIDT: Thank you.

5 JUDGE MACK: Now I would say that you
6 should probably want to respond to the argument that the
7 filing or the testimony is not proper rebuttal. That is
8 still on the table.

9 MS. SCHMIDT: Correct.

10 JUDGE MACK: O.K. Go ahead.

11 MS. SCHMIDT: What I would like to do is,
12 after hearing that it might have been a surrebuttal of
13 questions that were originally stated, because I'm a
14 senior citizen so these questions came from my heart, and
15 they all talk about the Opt Out Program that we're
16 working on or coming up with, so a lot of questions were
17 relevant and irrelevant, so I'm hoping that if the date
18 got cleared and that my testimony is still O.K., that it
19 would be accepted as is.

20 JUDGE MACK: You're arguing that it is
21 proper rebuttal?

22 MS. SCHMIDT: Well, if it needs to be
23 renamed, then I have to rename it. Because I put it as
24 rebuttal testimony of Sharon Schmidt.

25 JUDGE MACK: I understand. Is that what

1 you want to do?

2 MS. SCHMIDT: Well, what I'd like is to
3 keep that because it's my questions and my words and my
4 answers to questions that were presented. I mean it's on
5 the Opt Out Program.

6 JUDGE MACK: I understand what it says.
7 I don't think at this point renaming that is going to
8 alleviate the concerns. But I'll ask.

9 Mr. Solo, if this were to be treated as
10 surrebuttal, would your motion still stand?

11 MR. SOLO: Yes.

12 JUDGE MACK: And Ms. Barone?

13 MS. BARONE: Yes. We would still object.
14 As our motion indicates, it goes beyond the scope and
15 it's not relevant.

16 JUDGE MACK: Thank you. So renaming it,
17 Ms. Schmidt, is not going to alleviate the concerns. And
18 your position is it's proper rebuttal.

19 MS. SCHMIDT: Well, then it is proper
20 rebuttal, yes.

21 JUDGE MACK: O.K. Anything else?

22 MS. SCHMIDT: No.

23 JUDGE MACK: O.K. Thank you, Ms.
24 Schmidt. Let's take a break. We will entertain
25 responses. Let's take ten minutes, we'll come back at

1 11:00.

2 (At 10:50 a.m., a 15-minute recess was taken.)

3 JUDGE MACK: We're back on the record.
4 Mr. Solo, replies?

5 MR. SOLO: Thank you, your Honor. I have
6 very few responses, and I believe I have covered the
7 Company's argument in enough detail in my written
8 submission as well as oral argument I provided today.

9 I would like to provide one
10 clarification. This is predominately regarding the words
11 stated by Ms. Kurtz and the focus of the relevancy of
12 argument as based on Michigan Rule of Evidence 402, that
13 determines that this testimony that's subject to the
14 motions is outside the scope. She, in her narrative,
15 discussed case law that talks about the range of
16 litigation matters. That's precisely what our argument
17 is, that the content is outside the range of matters
18 litigated in this case. This case, the outcome of this
19 case will not determine any merit behind a health and
20 safety claim or a concern about technology claim. This
21 case is about the Opt Out proposal by the Company and,
22 frankly, solely the Opt Out proposal made by the Company.

23 It doesn't matter what the reason that a
24 requester would have for opting out, it's about how the
25 program operates and the associated costs. And so under

1 Rule 402, that's the basis for determining that it's
2 irrelevant and should be stricken.

3 I would also note that a number of the
4 cases cited in Ms. Kurtz's oral comments today were in
5 the context of Rule 403. Well, Rule 403 is the ability
6 to make inadmissible evidence that is other wise
7 determined to be relevant. Since our primary argument is
8 under Rule 402, that is not operative.

9 Earlier in my remarks this morning I did
10 also remind your Honor about the components in the
11 Administrative Procedures Act that would operate with
12 regard to the discretionary aspects of determining as
13 irrelevant or inadmissible otherwise relevant information
14 based on burden and prejudice and so forth, but I think
15 the key point here is based on the scope of this case and
16 the restrictions in MRE 402.

17 JUDGE MACK: So if you were to prevail on
18 the 402 argument, the 403 is moot because it only applies
19 to relevant evidence.

20 MR. SOLO: That's precisely my point,
21 your Honor.

22 JUDGE MACK: Thank you.

23 MR. SOLO: I probably should have said it
24 that clear in the first place. I have no further
25 comments then, your Honor.

1 JUDGE MACK: Thank you. Ms. Barone.

2 MS. BARONE: Yes, your Honor, just a few
3 comments. Mention was made that the case in U-17000 was
4 not an evidentiary hearing. It was not. It was a
5 proceeding started by the Commission to review issues
6 bearing on the deployment of smart meters by regulated
7 utilities in Michigan, as specified in the caption.
8 However, that was a proceeding that was sent to generally
9 consider concerns of various parties regarding smart
10 meters, and the Commission did issue an order making
11 certain findings.

12 That proceeding took place in addition to
13 Detroit Edison's rate cases in U-16472 and U-15768, where
14 the Company proposed utilizing certain meters and the
15 costs associated with them and their rates, and they were
16 in fact approved for consideration in a rate case. So
17 all those things put together are the places where the
18 issues regarding the type of meter they're using and
19 whether they should be using it have been considered.

20 JUDGE MACK: Just so I'm clear, the order
21 in U-17000 still has the same force and effect as any
22 other Commission order?

23 MS. BARONE: Yes. I mean, I think the
24 parties are trying to make the claim that --

25 JUDGE MACK: The underlying.

1 MS. BARONE: -- that it was a comment
2 docket and there was no record evidence per se. But
3 nonetheless, the Commission made a finding regarding
4 accepting the Staff's finding that the safety wasn't a
5 concern. But the subject matter of the case was the
6 Commission saying: When we look at these smart meters,
7 their costs and their benefits, we're going to do so in
8 rate cases. I think that's what's relevant here. That
9 is where in the next rate case -- in the past rate cases
10 the opportunity has been there to present record
11 evidence. In any future case it will be there to present
12 this sort of evidence.

13 And you know, the focus of this case we
14 would submit should be narrow to get an Opt Out tariff in
15 place and approved for those that the Commission
16 indicated in its order in 17000 should be considered and
17 approved to meet the concerns of the people that we have
18 here in our room today.

19 Also with respect to the issue of, I
20 believe one party mentioned that one reason to include
21 this evidence is to show that there are some people who
22 shouldn't have paid at all or maybe no one should have to
23 pay at all to opt out. But the Commission did
24 specifically recognize in that prior order that there are
25 people with these health concerns. And so that has

1 already been established. And to try to establish it
2 again here by having some individual saying I'm concerned
3 about my health because of my meter would be cumulative
4 evidence and, therefore, unnecessary. Even if one were
5 to accept their overall argument.

6 That concludes my remarks, your Honor.

7 JUDGE MACK: Thank you, Ms. Barone. We
8 will take a break at this point. We will resume at
9 11:30, at which time I will issue my ruling on the
10 motions. Thank you. We're off the record.

11 (Off the record from 11:14 to 11:30 a.m.)

12 - - -

13 JUDGE MACK: We are back on the record.
14 Having considered the motions, I would like to begin with
15 some controlling legal standards in this matter. This is
16 a this proceeding -- This proceeding is a contested case
17 covered by the Administrative Procedures Act, known as
18 the APA, and the Administrative Rules the Commission
19 promulgated under its authority. The APA defines a
20 contested case as a proceeding to determine the legal
21 rights, duties, and obligations of a named party. In
22 this case the parties are Detroit Edison, Commission
23 Staff, the Attorney General, and the nine intervenors.

24 As it pertains to the pending motions,
25 Section 75 of the APA, MCL 24.275 states, and I quote,

1 "In a contested case the rules of evidence as applied in
2 a non-jury civil case in circuit court shall be followed
3 as far as practicable, but an agency may admit and give
4 probative effect to evidence of a type commonly relied
5 upon by reasonably prudent men in the conduct of their
6 affairs. Irrelevant, immaterial, or unduly repetitious
7 evidence may be excluded."

8 In regards to this proceeding, I would
9 agree with Ms. Barone. Given the subject matter of PSC
10 cases, it is a relatively tough evidentiary standard as
11 it pertains to administrative law. The evidentiary rules
12 referenced in that provision are found in the Michigan
13 Rules of Evidence. Those rules define relevant evidence
14 as that having any tendency to "make the existence of any
15 fact that is of consequence to the determination of the
16 action more probable or less probable than would be
17 without the evidence." That's MRE 401. Except for
18 specific instances listed in MRE 403, which only applies
19 to relevant evidence, MRE 402 states that all relevant
20 evidence is admissible while evidence that is irrelevant
21 is inadmissible.

22 MRE 702 allows a witness to offer
23 opinion, provided they are qualified as an expert in the
24 subject matter by virtue of knowledge, skill, experience,
25 training or education. Conversely, a lay witness under

1 MRE 701 is limited to offering opinions or inferences
2 which are rationally based on their perception or helpful
3 to gain a clear understanding of the testimony or
4 determination of a fact at issue.

5 Finally, MRE Rule 801 defines hearsay as,
6 "A statement other than the one made by the declarant
7 while testifying at the trial or hearing, offered in
8 evidence to prove the truth of the matter asserted."
9 Unless it falls under the list of statements that are not
10 hearsay or one of the exceptions in MRE 803, hearsay is
11 inadmissible under MRE 802.

12 Turning to the scope of this proceeding,
13 which is the scope of these motions. On July 31, 2012,
14 Detroit Edison filed an application and supporting
15 documentation that requested the Commission approve its
16 proposal to implement its AMI Opt Out Program for
17 residential customers. In effect the program allows a
18 customer to elect to have a non-transmitting AMI meter
19 instead of a transmitting AMI meter. The application
20 seeks imposition of an \$87 one time charge and a \$15
21 monthly charge for customers to elect to have a
22 non-transmitting AMI meter installed. Edison in that
23 filing contends the fees represent the costs it will
24 incur in servicing the non-transmitting AMI meters.

25 During the prehearing conference on

1 September 10, 2012, the nine intervenors were granted
2 intervention based on their status as residential
3 customers of Detroit Edison who would be subject to the
4 proposed rate.

5 While this case was pending, the
6 Commission entered an order on September 11, 2012, in
7 Case No. U-17000. That order dealt with a number of
8 issue pertaining to AMI, including what if any health
9 risks are associated with AMI meters. On page 5 of that
10 order the Commission directly -- expressly directed that
11 investor-owned electric utilities provide an opt out
12 option to its residential customers based on "cost of
13 service principles." It's my understanding those
14 principles would entail setting the rate for opting out
15 of the AMI at the cost Edison will incur for providing
16 non-transmitting meters to residential customers who
17 elect to opt out.

18 That is a scope of this hearing. Any
19 evidence or offer of evidence that goes beyond that
20 issue, including the purported health effects of AMI
21 meters, is irrelevant and thus inadmissible.

22 With that, I will go through each and
23 every motion and state my ruling on the record.

24 First is Edison's motion to strike filed
25 under Docket No. 202 and Staff's motion to strike filed

1 under Docket 215, page 4. It concerns the direct
2 testimony of Matthew Ben-Bassat. It's offered by
3 Ms. Kurtz and Edwards who responded to the motion in
4 Docket No. 224. The proposed evidence challenged in the
5 motions all go to the purported health effects of AMI
6 meters, which is beyond the scope of the subject matter
7 of this proceeding. Therefore, the proposed evidence is
8 irrelevant under MRE 401 and inadmissible under MRE 402.
9 Further, the challenged evidence contains opinions but
10 fails to provide a basis to accept the witness as an
11 expert under MRE 702. Therefore, those opinions are
12 inadmissible. As a result, the motions are granted.

13 Next, Edison's motion to strike filed
14 under Docket No. 203, Staff's motion to strike filed
15 under Docket 215, page 5, concerns the entire direct
16 testimony of Curtis Bennett and Exhibits 1 through 10.
17 Mr. and Mrs. Cusumano filed a response to that motion
18 under Docket No. 226.

19 I would like to note that in the response
20 the Cusumanos cite to a recent decision at the Court of
21 Appeals, 296 Mich App 101, dated April 10, 2012. It is
22 my conclusion that that case does not support the
23 argument that this case would have the broad scope they
24 seek. That case is a remand for Case No. U-15768 and not
25 this case, and further the Court noted in Footnote 3,

1 Case No. U-17000 will provide the evidentiary information
2 if found lacking in Case No. U-15768.

3 Therefore, the proposed evidence
4 challenged in the motion all go to the purported health
5 effects of AMI meters, which is beyond the scope of the
6 subject matter of this proceeding. Therefore, the
7 proposed evidence is irrelevant under MRE 401 and
8 inadmissible under MRE 402. Further, the challenged
9 evidence contains opinions but fails to provide a basis
10 to accept the witness as an expert under MRE 702.
11 Therefore, those opinions are inadmissible.

12 Finally, the proposed evidence challenged
13 in the motion is hearsay, constitutes statements offered
14 to prove the truth of the matter asserted. As such, the
15 evidence is hearsay under MRE 801 and thus inadmissible
16 under MRE 802. For these reasons, the motions are
17 granted.

18 Next, Edison's motion to strike filed
19 under Docket No. 204, Staff's motion under Docket 215,
20 page 8, the entire direct testimony of Cynthia Edwards.
21 Ms. Edwards, in conjunction with Ms. Kurtz, filed her
22 response under Docket No. 224. The evidence challenges
23 all of the testimony that goes to purported health
24 effects. It also contends that Ms. Edwards is not
25 qualified to provide expert opinion and that hearsay is

1 contained in the testimony at page 2, lines 27 through
2 29, page 3, lines 17 through 19, and Exhibit -- I'm
3 sorry, strike that. Exhibit 2 was withdrawn.

4 In considering this proposed evidence, I
5 would note that it all goes to health effects of AMI
6 meters, which is beyond the scope of the subject matter
7 of this proceeding. Therefore, the proposed evidence is
8 irrelevant under MRE 401 and inadmissible under MRE 402.
9 Further, the challenged evidence contains opinions, it
10 fails to provide a basis to accept the witness as an
11 expert to render such opinion under MRE 702. Therefore,
12 those opinions are inadmissible.

13 At this point I should probably also
14 note, Ms. Kurtz, your contention regarding MRE 401, MRE
15 402, MRE 701 and 702, and MRE 801 and 802 would
16 effectively viciate a prohibition on that type of
17 evidence. These aren't preliminary questions, these are
18 substantial questions that require expertise to render
19 opinions on that. So I am rejecting your argument.

20 I would also note that the proposed
21 evidence challenged in the motions is hearsay,
22 constitutes statements offered to prove the truth of the
23 matter asserted. As such the evidence is hearsay under
24 MRE 801 and thus inadmissible under MRE 802. Therefore,
25 the motion is granted. The motions are granted.

1 Next we have Edison's motion to strike
2 filed under Docket No. 205, Staff's motion filed under
3 Docket 215, page 8, which concerns the entire direct
4 testimony of Karen Strode. Ms. Kurtz and Ms. Edwards
5 filed a response under Docket No. 224. The motions
6 challenge the admissibility under relevancy, also under a
7 lack of basis to provide expert opinion, and hearsay at
8 page 8, lines 11 through 17.

9 In considering that proposed evidence, it
10 is determined that it also goes to the purported health
11 effects of the AMI meters, which is beyond the scope of
12 the subject matter of this proceeding. Therefore, the
13 proposed evidence is irrelevant under MRE 401 and
14 inadmissible under MRE 402. Further, the challenged
15 evidence contains opinions but fails to provide a basis
16 to accept the witness as an expert to render such opinion
17 testimony under MRE 702. Therefore, those opinions are
18 inadmissible.

19 Finally, the proposed evidence challenged
20 in the motions is hearsay, constitutes statements offered
21 to prove the truth of the matter asserted. As such, the
22 evidence is hearsay and thus inadmissible.

23 Next is Docket No. 206, Edison's motion
24 to strike, Docket No. 215, page 9, Staff's motion to
25 strike the entire direct testimony of Leslie

1 Panzica-Glapa. It's offered by Ms. Kurtz and Edwards who
2 responded to the motions under Docket No. 222. The
3 motions challenged the cited testimony as irrelevant. It
4 also, the motions also contend it contains expert
5 opinion, and it contains hearsay at page 2, lines 26
6 through 27, and Exhibit 1 and Exhibit 2 are hearsay.

7 In considering that proposed evidence,
8 the testimony, the challenged testimony goes to purported
9 health effects of AMI meters, which is beyond the scope
10 of the subject matter of this proceeding. Therefore, the
11 proposed evidence is irrelevant under MRE 401 and
12 inadmissible under MRE 402. The challenged evidence
13 contains opinions but fails to provide a basis to accept
14 the witness as an expert under MRE 702. Therefore, those
15 opinions are inadmissible. Finally, the proposed
16 evidence challenged in the motions is hearsay,
17 constitutes statements offered to prove the truth of the
18 matter asserted. As such, the evidence is hearsay and
19 inadmissible. And therefore, those motions are granted.

20 Next, Edison's motion to strike filed
21 under Docket No. 270, Staff's motion under Docket No.
22 215, page 6, the entire direct testimony of Linda Kurtz.
23 Ms. Kurtz and Ms. Edwards filed a response to the motion
24 under Docket No. 224. The motions challenge the
25 testimony under relevance, not qualified to provide

1 expert testimony, and that it contains hearsay at page 7,
2 lines 23 through 27. Again the proposed evidence
3 challenged in the motions all goes to the purported
4 health effects of AMI meters, which is beyond the scope
5 of this hearing. Therefore, the proposed evidence is
6 irrelevant under MRE 401 and inadmissible under MRE 402.

7 In regards to the opinion testimony,
8 there is a failure to provide a basis to accept the
9 witness as an expert under MRE 702, and so therefore the
10 opinion testimony is inadmissible. Finally, the proposed
11 evidence challenged in the motions is hearsay,
12 constitutes statements offered to prove the truth of the
13 matter asserted. As such, the evidence is hearsay and
14 inadmissible.

15 Next, Edison's motion to strike filed
16 under Docket 208, Staff under Docket 215, page 6, the
17 entire direct testimony of Loretta Yoskovich. Ms. Kurtz
18 and Ms. Edwards. They responded in Docket No. 204. The
19 motions challenge the proposed testimony under relevancy
20 and a failure to provide a basis to provide expert
21 testimony.

22 In considering that proposed testimony,
23 it is noted it all goes to purported health effects of
24 AMI meters, which is beyond the scope of the subject
25 matter of this proceeding. Therefore, it is irrelevant

1 and inadmissible. Further, the opinions do not provide a
2 basis for the witness to give expert testimony.
3 Therefore, the motions are granted.

4 Next, Edison's motion to strike filed
5 under Docket No. 209, Staff's filed under Docket 215,
6 page 7. It concerns the entire direct testimony of
7 Rebecca Morr as offered by Ms. Kurtz and Ms. Edwards who
8 responded in Docket No. 204. The motions challenged the
9 testimony under relevance, expert opinion, and hearsay at
10 page 7, lines 23 through 24, 31 through 34, and page 8,
11 lines 1, 2, page 9, lines 2, 7.

12 The proposed evidence challenged in the
13 motion all go to the purported health effects of AMI
14 meters which is beyond the scope of the subject matter of
15 this proceeding. Therefore, the proposed evidence is
16 irrelevant and inadmissible.

17 Further, the challenged evidence contains
18 opinion but fails to provide a basis to accept the
19 witness as an expert under MRE 702. Those opinions are
20 inadmissible. The proposed evidence challenged in the
21 motions as hearsay, constitutes statements offered to
22 prove the truth of the matter asserted. As such, the
23 evidence is hearsay under MRE 801 and inadmissible under
24 MRE 802. The motions are granted.

25 Next, Edison Docket No. 210, Staff Docket

1 No. 215, page 11, motion to strike portions of the direct
2 testimony of Richard Meltzer and all of the rebuttal
3 testimony of Mr. Meltzer. It challenges the direct
4 testimony under relevance, failure to provide a basis to
5 give expert opinion, and hearsay.

6 In considering the direct testimony, it
7 goes beyond the scope of this proceeding. It does not go
8 to cost of service principles. Therefore, it is not
9 relevant, it is inadmissible. It also contains opinion
10 testimony that no basis is provided for the witness to
11 give such testimony, and the direct contains hearsay at
12 lines 163 through 248 and 290 through 307. Therefore, as
13 it pertains to the direct testimony of Mr. Meltzer, the
14 motions are granted.

15 The rebuttal testimony. I will take into
16 account that Mr. Meltzer is not an attorney, that he in
17 good faith filed the surrebuttal under Docket No. 222.
18 Despite the fact that he did not file a motion under my
19 discretion to allow the filing of rebuttal testimony, it
20 will be accepted as rebuttal testimony. However, I'd
21 like to address the argument that it contains argument
22 and not fact. It is a close question, but I think a fair
23 reading of the testimony is, it is an attempt to refute
24 the testimony of Mr. Sitkauskas in that Mr. Meltzer is
25 attempting to contradict, explain, or disprove elements

1 of that testimony. Therefore, the motion to strike as
2 being argument is denied.

3 However, any portion of that evidence
4 which the parties believe go beyond the scope of this
5 hearing, they will be able to re-visit in a motion to
6 strike when we resume the hearing next week. I
7 understand there is some difference between the rebuttal
8 and surrebuttal so I wanted to give you the opportunity
9 to do a thorough review consistent with my holding today.
10 So therefore, the motion to strike as it pertains to the
11 rebuttal/surrebuttal is denied consistent with my
12 holding.

13 Next is the rebuttal testimony of
14 Ms. Sharon Schmidt. Edison filed a motion to strike
15 under Docket No. 211, Staff under Docket No. 215, page
16 12. As I indicated during the argument, I will reject
17 that it was filed untimely. I believe Ms. Schmidt
18 provided a good cause as to why it was two days late.
19 However, a fair reading of the testimony is, it is not
20 rebuttal testimony. Rather, it is answers to
21 interrogatories, which is not evidence. Rebuttal
22 testimony is by definition intended to refute testimony
23 contained in the direct case of a party opponent. So
24 therefore, since it is not responsive to evidence, the
25 motions are granted.

1 I would note that next is Edison's motion
2 under Docket 212, Staff's under Docket 215, page 13, and
3 concerns the direct testimony of Tom Wilson. Ms. Kurtz
4 and Ms. Edwards have indicated that they have withdrawn
5 the testimony of Mr. Wilson, so therefore those motions
6 are moot.

7 This leaves the motion concerning Mr.
8 HOLETON's testimony and direct testimony. Mr. HOLETON
9 did not, as he argued strenuously, go into health issues.
10 He is attempting to argue, to some extent, cost issues.
11 I think you're also attempting to argue that there was
12 some form of subterfuge on behalf of the Company
13 concerning local communities. That is beyond the scope
14 of this proceeding. That does not go to the cost of
15 service principles.

16 However, I think your testimony
17 concerning the meters and the effect of those meters is
18 admissible, it is relevant. So I will allow that to
19 stand.

20 The other issue I had was your attempt to
21 indicate whether these meters are mandatory or not. I
22 believe the affidavits that you have provided and
23 Mrs. HOLETON provided are in effect your testimony. That
24 it's your understanding of a conversation with Commission
25 Staff, or you were told that the meters are not

1 mandatory. I will allow the affidavits to come in, and
2 you will be subject to cross-examination if any of the
3 parties so choose. I will also allow the information you
4 have provided concerning the different types of meters
5 from websites. It's -- I'll leave the parties to argue
6 the weight of those, but I want you to be able to make
7 your argument.

8 However, I will strike Exhibit A-1, which
9 is a public law. That is not fact, that is not a proper
10 exhibit. And I will strike Exhibit A-4. It is a link to
11 a You Tube video. That is inherently unreliable,
12 therefore it is hearsay. Or it is hearsay because it's
13 unreliable.

14 The other thing you had was the letter,
15 November 10, 2011, from Commission Staff. I will allow
16 that under the type of evidence people rely on in the
17 normal course of their affairs.

18 Yes, Mr. Holeton?

19 MR. HOLETON: O.K. You're striking A-1,
20 A-4, and you're allowing the MPSC letter?

21 JUDGE MACK: Yes. I'm sorry I got a
22 little disjointed here. But let's go through them at
23 this point.

24 MR. HOLETON: Yes, if you can give me --.

25 JUDGE MACK: A-1 is stricken. Any and

1 all testimony concerning A-1 is stricken. Motion as it
2 pertains to A-2, denied. Motion as it pertains to A-3,
3 denied. Motion as it pertains to A-4, granted, stricken,
4 any and all testimony regarding A-4. Exhibits A-5A and
5 A-5B are accepted as your direct testimony, your wife's
6 direct testimony, concerning your understanding of the
7 conversations at the Ypsilanti forum. Exhibit A-6, the
8 motions are denied to strike. It will be admitted.
9 Exhibit A-7, a letter from Staff, it's reasonable to rely
10 on that, it is admitted.

11 MR. HOLETON: That's A-7.

12 JUDGE MACK: A-7 is the letter from
13 Ms. Flores. Exhibit A-8 is a listing of municipalities.
14 I will allow that in. Exhibit A-9 is a string of e-mails
15 along with an attachment, appears to be informational,
16 although I'm not entirely sure. However, it appears that
17 it's some from DTE, some from communities, in response to
18 a FOIA request, I will allow it. And then you have two
19 letters from DTE under A-9, three letters I'm sorry, to
20 municipalities. I'll allow that under the type that
21 reasonable people would rely on.

22 A-10 are minutes, there's no indication
23 that it was provided by a clerk, so therefore there is no
24 indication that it's official minutes. I will grant the
25 motion to strike Exhibit A-10.

1 That concludes my rulings on the motions.
2 Mr. Holetton, go ahead.

3 MR. HOLETON: Yes. So only thing struck
4 is A-1, A-4, and A-10.

5 JUDGE MACK: I believe that's it.

6 MR. HOLETON: Thank you, your Honor.

7 JUDGE MACK: Thank you. For the parties'
8 information, I have obtained or have made copies of the
9 rules concerning the marking of exhibits and testimony,
10 along with an information sheet the Commission comes out
11 with. It is your obligation at the hearing to present
12 your testimony and your exhibits in accordance with these
13 rules. I will leave it up here, and you are free to take
14 those and do with them as you see fit. That is all I
15 have.

16 Mr Solo, do you have anything?

17 MR. SOLO: Nothing further, your Honor.

18 JUDGE MACK: Ms. Barone?

19 MS. BARONE: Nothing further.

20 JUDGE MACK: Mr. Janiszewski?

21 MR. JANISZEWSKI: No, your Honor.

22 JUDGE MACK: Mr. Holetton?

23 MR. HOLETON: No, your Honor. The next
24 hearing, let me -- Could I have you clarify, that the
25 next hearing we have to provide a brief submitted by

1 those rules to present as evidence, to discuss between
2 the parties? And I could call DTE and MPSC as witnesses
3 in that testimony?

4 JUDGE MACK: That's your first compound
5 question.

6 MR. HOLETON: I know.

7 JUDGE MACK: There are no briefs at the
8 hearing. At the hearing are sworn witnesses providing
9 factual testimony and their qualified expert opinion.
10 You will be allowed the opportunity to cross-examine
11 witnesses, and the other parties will have the
12 opportunity to cross-examine witnesses.

13 Now when you talk about -- I don't know
14 if everybody is going to be here that you want to be
15 here. That, I would ask.

16 MR. HOLETON: Well, this is --

17 JUDGE MACK: Not me.

18 MR. HOLETON: When I put in my motion to
19 deny Mr. Solo's testimony, I asked that Mr. Sitkauskas,
20 Mr. Isiogu, and Mr. Hudson from MPSC be called as
21 witnesses to rebut his motion. And I'm just wondering if
22 I could provide a list for the MPSC and DTE for Mr.
23 Sitkauskas, Ms. Flores, to testify at this time.

24 JUDGE MACK: Well, you can always ask. I
25 think first of all, Mr. Sitkauskas is going to be

1 available for cross-examination.

2 MR. SOLO: That's correct, your Honor.

3 JUDGE MACK: So that would answer that
4 question.

5 MR. HOLETON: Is anybody from the MPSC
6 available as a witness?

7 JUDGE MACK: Well, you can ask counsel
8 that off the record. And if they're not available,
9 there's remedies under the law. But I can't give you
10 legal advice on how to exercise that.

11 MR. HOLETON: I really need the remedy.

12 MS. BARONE: Your Honor, I'd just note
13 for the record that Staff objects to providing an adverse
14 witness to testify for Mr. Holeton to the extent he wants
15 to explore a legal issue regarding this so-called
16 allegation about the word mandatory and meters. I don't
17 think that's proper for the hearing, and I do object to
18 having Mr. Hudson appear as he requested on that basis.

19 JUDGE MACK: Mr. who?

20 MS. BARONE: Pat Hudson.

21 MR. HOLETON: And Commissioner Isiogu.

22 MS. BARONE: Well, I'm getting to that.

23 JUDGE MACK: Can I say this, Ms. Barone?
24 The way I read that response is, he requested those
25 individuals appear if his evidence was stricken. So it

1 was in connection with this motion. The motion was
2 granted in part and denied in part. I don't know what
3 Mr. HOLETON is going to ask. You can object, but you
4 don't know what he's going to ask and I'm not going to
5 rule on it at this point. If we have to, I'll rule on it
6 the first thing Tuesday morning. I would assume if he
7 made a request for individuals who were going to testify,
8 you would tell him that. If they're not going to
9 testify, you could also tell him that too. But it's
10 understood, you're not going to go out and seek witnesses
11 for him.

12 MS. BARONE: Yes. That's correct, your
13 Honor. And with respect to Commissioner Isiogu, the
14 Staff would be objecting to him appearing at all because
15 he's a decision maker in this case and it would violate
16 of thought process privilege and other privileges for him
17 to testify in this case.

18 JUDGE MACK: I understand. I would
19 anticipate those arguments if that were presented to me.

20 Anything else, Mr. HOLETON? Does that
21 explain what we're doing on Tuesday? Tuesday are facts.
22 Tuesday are: Raise your right hand, swear or affirm, and
23 then provide facts. Today was argument; no facts were
24 put on the record today.

25 MR. HOLETON: Tuesday is just facts. I

1 can swear to facts, that people have testified to facts,
2 that's it.

3 JUDGE MACK: Is that everything?

4 MR. HOLETON: Yes, your Honor.

5 JUDGE MACK: Any other questions?

6 MR. HOLETON: Well, there will be a
7 million questions, your Honor, but I'm not going to
8 burden you with that.

9 JUDGE MACK: Well, it wouldn't be a
10 burden, but there's not a lot I can help you with.

11 MR. HOLETON: Do you know of any lawyers
12 I can get between now and then?

13 JUDGE MACK: I don't know any good
14 lawyers. (Laughter)

15 Mr. Cusumano, any questions?

16 MS. CUSUMANO: I have a question.

17 JUDGE MACK: Hold on a second.
18 Mr. Cusumano, do you have any questions?

19 MR. CUSUMANO: No, no questions.

20 JUDGE MACK: Thank you. Mrs. Cusumano?

21 MS. CUSUMANO: Yes, your Honor. I have a
22 question as to numerous questions which were never
23 answered by DTE, Mr. Sitkauskas. Can we put in a motion
24 to compel them to answer questions that they refused to
25 answer and to name parties to which they did not answer

1 to the questions in the interrogatories?

2 JUDGE MACK: I would suggest you don't
3 file a motion. Mr. Solo has indicated that
4 Mr. Sitkauskas is going to be here and available for
5 cross-examination. So if you have questions of him,
6 there is your opportunity.

7 MS. CUSUMANO: And with regard to
8 additional questions that we may have prior to the
9 hearing, are we still allowed to submit some
10 interrogatories?

11 JUDGE MACK: I stay out of discovery
12 unless and until I get a motion to compel. I stay out of
13 discovery. But we're on the eve of hearing.

14 MS. CUSUMANO: Excuse me?

15 JUDGE MACK: We're on the eve of the
16 hearing. So you know, at some point discovery has to end
17 and the parties are preparing for hearing. I'll say that
18 as a general matter. But if you submit interrogatories,
19 I'll leave it to you.

20 MS. CUSUMANO: Thank you.

21 JUDGE MACK: Is that it? Thank you. Ms.
22 Edwards, any questions?

23 MS. EDWARDS: No.

24 JUDGE MACK: Thank you. Mr. HOLETON, we
25 got you.

1 Ms. Kurtz, any questions?

2 MS. KURTZ: Yes. One question regarding
3 discovery as well. I'm foreseeing a response to my
4 motions for discovery today and expecting to get the
5 usual answers that, you know, most of them are irrelevant
6 and so on. And I heard what you just said to Mrs.
7 Cusumano, which is why I'm asking this. What if Mr.
8 Sitkauskas is unable to answer the questions? I don't
9 think that a lot of questions that I have asked are going
10 to be something that he is going to be able to answer.

11 JUDGE MACK: Well, what questions? The
12 questions in your interrogatories or the --

13 MS. KURTZ: Yes.

14 JUDGE MACK: In your interrogatories? I
15 don't get involved in discovery. The rules provide a
16 process if the parties can't work out discovery. Follow
17 the rules.

18 MS. KURTZ: So your answer to her was
19 that, well, you can ask Mr. Sitkauskas. But my -- given
20 that reply, my question is: I don't expect him to have
21 all the facts and figures that I'm requesting at hand at
22 the cross-examination. O.K.

23 JUDGE MACK: I mean, I don't tell the
24 witness what to bring.

25 MS. KURTZ: O.K.

1 JUDGE MACK: Lawyers deal with it.

2 Mr. Meltzer, do you have anything?

3 MR. MELTZER: Yes. In terms of clarity
4 here, jumping in on the last statement. Let me say it
5 this way. Much of the cost information that has been
6 provided has to do with alterations to information
7 systems, the billing systems, and so on and so forth. I
8 expect that Mr. Sitkauskas will not be able to answer to
9 the degree that is most relevant. He may have a few top
10 level figures, but as he has indicated in his own
11 testimony, he has said: I got those figures from the IT
12 department. Will there be anyone from the IT department
13 that could be questioned to probe those figures more.

14 JUDGE MACK: I have no idea. I mean I
15 show up on Tuesday, I don't know. Counsel is here.

16 MR. MELTZER: How do we --

17 JUDGE MACK: There is a process. You can
18 talk to counsel, and there is a process in the rules for
19 compelling discovery. But I don't know.

20 MR. MELTZER: We have three days marked
21 off on the calendar.

22 JUDGE MACK: We have three days scheduled
23 for hearing.

24 MR. MELTZER: Could you give us who are
25 inexperienced with such matters a sense and a feel for

1 how things are going to roll out over these three days?

2 JUDGE MACK: The Company will put on its
3 witnesses. They will be offered for cross-examination.
4 The Company will rest its case, and then the parties put
5 on their witnesses, they're subject to cross-examination,
6 and the record closes and briefing follows.

7 MR. MELTZER: It's three days for sure.

8 JUDGE MACK: Well, it's scheduled for
9 three days. Again if nobody asks any questions, we'll be
10 out of here by 10:30 that morning.

11 MR. MELTZER: It won't go longer than the
12 three days?

13 JUDGE MACK: Well, again that's out of my
14 hands. All I know, I will be here Tuesday morning at
15 9:00 a.m. and we'll have a witness in that chair.
16 Anything else?

17 MR. MELTZER: O.K. Thank you.

18 JUDGE MACK: I'd like to thank --
19 Ms. Cusumano, we are on the record so.

20 MS. CUSUMANO: Sorry to bother you. I
21 just need to understand something. If Mr. Sitkauskas
22 comes before this Court and says that he does not have
23 the ability to answer to certain questions that were
24 still part of the interrogatories that were not answered,
25 are we going to be allowed to request that those

1 witnesses appear, that they would be brought up into the
2 case?

3 JUDGE MACK: Mrs. Cusumano, you can
4 request anything and I'll get responses from the other
5 parties and I'll rule on it. But what happens, I mean we
6 could sit here all day and go through what happens. I
7 don't know. But you can always request.

8 MS. CUSUMANO: O.K. I'm sorry to burden
9 you with this, but my problem is that there were a lot of
10 questions in the interrogatories that absolutely were not
11 answered that are very relevant to the issues at hand.

12 JUDGE MACK: Well, I'd like to avoid
13 characterizing the interrogs on the record.

14 MS. CUSUMANO: O.K.

15 JUDGE MACK: So at this point I'm going
16 to go off the record and conclude oral arguments.

17 (At 12:05 p.m., the hearing was adjourned to
18 Tuesday, January 15, 2013, for cross-examination.)

19 - - -
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Marie T. Schroeder (CSR-2183), do hereby certify that I reported in stenotype the proceedings had in the within-entitled matter, that being Case No. U-17053, before Dennis W. Mack, Administrative Law Judge with MAHS, at the Michigan Public Service Commission, Lansing, Michigan, on Tuesday, January 8, 2013; and do further certify that the foregoing transcript, consisting of Volume 2, Pages 98-206, is a true and correct transcript of my stenotype notes.

Marie T. Schroeder, CSR-2183
33231 Grand River Avenue
Farmington, MI 48336

Dated: January 14, 2013